EXTRADITION AS A METHOD OF COMBATING INTERNATIONAL TERRORISM : A U.S. PERSPECTIVE

Wendy Lazarus

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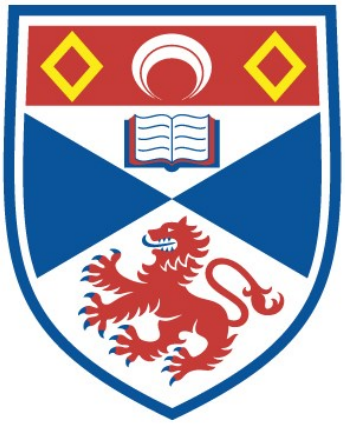

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Extradition As A Method Of Combating International Terrorism: A U.S. Perspective

Degree for a Doctor of Philosophy

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Abstract

This study evaluates, through history and analysis, the value of extradition as a method of combating international terrorism during the past two decades, from the perspective of the U. S. experience. Through the adoption of an integrated framework, a case study approach is applied with the intention of illuminating major themes and issues relevant to state response and terrorist extradition, while exposing several underlying themes about the political relationship between extradition and terrorism. Historical analysis demonstrates that current methods of rendering fugitive terrorists are not just the simple application of international rules, but an evolving process of law. Alternatives to the use of extradition are also examined, with particular reference to state sponsored terrorism, their impact on extradition, the prospects for military retaliation, and the potential for alternatives such as an International Criminal Court. The evolving nature of terrorist extradition is examined in concert with the changing nature of terrorism itself, and how ultimately this influences not only the law, but also law enforcement. By utilising such an approach, the study seeks to extricate the fundamental issues behind U.S. extradition policy, and ultimately the usefulness of extradition as a tool against terrorism.

Declarations

I, Wendy Lazarus, hereby certify that this thesis, which is approximately 100,000 words in length, has been written by me, that it is the record of work carried out by me and that it has not been submitted in any previous application for a higher degree.

Date 8 September 2001 Signature of Candidate _____

I was admitted as a research student in January 1995 and as a candidate for the degree of Ph.D. in January 1995; the higher study for which this is a record was carried out in the University of St. Andrews between 1995 and 2001.

Date 8 September 2001 Signature of Candidate _____

I hereby certify that the candidate has fulfilled the conditions of the Resolution and Regulations appropriate for the degree of Ph.D. in the University of St. Andrews and that the candidate is qualified to submit this thesis in application for that degree.

Date 4 October 2001 Signature of Supervisor _____

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Acknowledgements

Perhaps the best piece of advice ever given to me about this project was 'make sure you like your topic, because that's all you're going to read for the next few years.' Fortunately, this was one of the few pieces of early advice that I actually followed. 'This is not an easy topic, and what you're looking to accomplish will not be an easy task', came the later warnings. Still I am fortunate, that this was one bit of advice that I actually ignored. Truth is, I loved my topic, and for very personal reasons. Although I may have encountered some very bumpy spells along this journey, I have no regrets along the path I have chosen. This was more than just a study about terrorism, or about law. It was about re-defining how I thought about the world, and America's very special role in it. The *reason* I chose terrorism, is because they were the incidents growing up, that I remembered with the greatest of clarity.

From a relatively early stage, I realized rather quickly, that all the really bad things that happen in other parts of the world don't really happen here. Bombs are not being dropped through your roof, cars don't explode outside of public places, and madmen don't run around strapped with explosives waiting for a crowded room. Even with all those 'starving children in Africa' that my parents warned me about, meant nothing as I tossed aside my vegetables. I live in a free country – and these bad things just don't happen here. As a child of the Cold War, I never feared the Soviets, or being destroyed by nuclear war. As the daughter of a decorated combat U.S. Marine, I was convinced we could never lose any fight, anywhere – ever! Of course, having never had to fight *for* anything *ever*, it was a relatively safe position to take. All the fighting had been done long before I was born. Two World Wars, a forgotten war in Korea, and a bloody Vietnam – had already happened to the U.S. before I was ever able to walk. My friends never went to war – they went to soccer camp. The bread lines, war bonds, and flag-draped coffins, things that shaped my parents childhood, never touched mine. A gift my generation will probably never fully appreciate. Nonetheless, I was raised blissfully unaware of these bad things.

In 1979, I was all of nine years old when the American hostages were held in Iran, and I couldn't understand why my country was taking so long to bomb them back into the Stone Age. And while my parents could explain many things, terrorism wasn't one of them. I had never witnessed my father become emotional about anything on the news, but in 1983 when they showed rescue workers tearing through the rubble removing the bodies of his Marine brothers from their barracks in Beirut, he was close to tears. 'They were sleeping', he kept saying repeatedly. I never forgot that.

When U.S. Navy diver Robert Stetham was shot during the TWA 847 incident, his badly beaten body thrown on the tarmac, I was 15, old enough to know what was going on, and really angry. *Why but why are we letting this happen! We are American's dammit! You can't do that to us! Where are the bombs! Where are the planes! Where's the rockets red glare!* So, in 1985 when U.S. President Ronald Reagan forced down the Egyptian airline carrying the terrorists who shot wheelchair-bound Leon Klinghoffer and tossed his body off the *Achille Lauro*, like much of

America, I was ecstatic! *Go get'em gipper!* Little did I know at that point, that the hijackers ultimately got away. So much for hubris.

A year later when I was in college, oddly enough, none of my classes touched on what was happening in the world. In fact, not until my third year, when Dr. Frank LeVennes made the first stab at trying to teach a room full of 19 year olds about U.S. Foreign Policy, was the situation in the Middle East even mentioned, but no terrorism. In my final year, we saw a video about it once during a seminar – but no one knew enough about it to actually teach it, and subsequently it was never taught. All these events that had so profoundly shaped how I thought about the world in my early teen-age years, were never even brought up for discussion, and never explained. I understood this to mean, that *bad things happen when you leave our shores. American's were only truly safe in America.* My parents did much to promote this thinking as a way of preventing their teen-age daughter from backpacking in Europe. A battle they ultimately won.

In 1993, I was working for a law firm in mid-town Manhattan, when my secretary came tearing into my office 'THEY JUST BLEW UP THE WORLD TRADE CENTER!' Amused by this - I laughed at her. *Do you know what you just said?* Then my boss turned the corner into my office, the blood completely gone from her face, 'a bomb just went off in the Trade Center.' I still didn't believe it. I grabbed the phone and started calling the offices of all my friends who worked in the Trade Center, only to get busy signals, one after the other. I raced into the conference room where by now, about a hundred or so of my colleagues had assembled, and I watched in horror as they removed bodies from the wreckage into the blustery cold February afternoon. *But...my friends are in there! This can't be happening! These things just don't happen here!* It happened all right. The bad things finally happened. Now they were *here*.

My decision to study this topic is something I have been asked throughout my studies, many times in fact, and usually in the form of 'why the hell are you studying terrorism?' The answer is easy. For years, I have been fascinated with this subject. Not just the 'who, what, and where' questions about terrorism, but the 'why'. Why do we respond the way we do? Why do we have to? It is a question about the world that I've never been able to answer growing up, and one that no one has ever been able to answer for me. I have used these case studies for one very simple reason: I remember them. They meant something to me growing up, and I felt something because of them that I didn't like – helplessness. Yet, throughout my years of education, I have never been able to understand why they happened. While writing a Ph.D. may seem a bit of an extreme, and expensive, way to answer a question, it leaves no doubt that any intellectual curiosity about the subject has been suitably addressed, and oddly enough, I still don't have any of the answers.

My second favourite question to answer throughout my studies has been 'why did you go overseas to study terrorism?' Very simple, because we really don't have any terrorism here in the United States. Notwithstanding the World Trade Center incident, or Oklahoma City, America has – thankfully – not truly grappled with the issues of terrorism and security the way their European cousins have. Hence, the lack of

academic centers dedicated solely to learning and understanding the topic, and which St. Andrews was able to so richly offer. There is a much deeper, and much more real understanding of the topic abroad, and mainly because, well, bad things have happened there. Further, I believed as an American studying International Relations, it makes sense to broaden the horizon line a bit and at least take a stab at being a little more 'international'. Truthfully, I wanted more than just an American perspective; since that was the one thing I knew I already had. Unfortunately, this is something many of my peers did not quite agree with, assailing me with accusations that I was 'too old to run away from home' - and my parents still think I was just trying to get back at them for that lost vacation to Europe.

And so, in January of 1995, I wind up in St. Andrews. I'm cold – all the time, confused about what Haggis really is, and not really sure if I believe it's a three legged bird that runs around mountain tops, and still I'm full of questions - only not about terrorism. *Was this the right thing to do? Am I smart enough to write a Ph.D.? What the hell was I thinking? What am I doing here anyway? Do these people know they're driving on the wrong side of the road?* Before I talked myself out of the project altogether, my good friend Gus Xhudo took me for a walk down the beach along the West Sands. He assured me that this *was* the right thing to do, that I was *plenty* smart to write a Ph.D., that it will *never* be warm here so start investing in some good wool sweaters, and that Haggis was something I was *never, never, ever*, to touch. When we got to the end of the beach, he stopped - and in his distinct Lodi, New Jersey accent he said 'kid, this place, I'll tell ya – it's like magic. It doesn't matter what you or I did before this. All the coulda, woulda, shoulda, tried but failed, never happened because … it doesn't exist here. That's all gone. Because from here, it's a new ball game, it's a clean slate, because from here, you have another shot. From here, you're gonna prove yourself and tell 'em all back home who said you weren't good enough to go to hell. From here it all begins – and you know why? Because you're *here*.' There are very few things that Gus ever said that I ever really listened to with any real sense of permanence, and at this stage, I was questioning why I had let him talk me into coming 'here' anyway. But when I turned around, I saw this beautiful sight: the fog settling over the skyline of a town that time has preserved almost untouched for hundreds of years. I stopped and just looked for a minute, then took a deep breath and prayed that Gus was right, which ultimately he was. I never forgot the conversation that day. For the next few years I would walk that same route, always by myself, and remember why it was I came here. What this subject meant to me, and what I needed to answer for myself. It wasn't until I returned to the United States, that I realised how much my life had changed, and how much I had changed, but one thing was clear. I had changed for the better because of St. Andrews, and the path that lies before me now, is there because I started from 'here'. And it is from here that I have found my way.

Every so often, when I feel I'm getting too smart for my own family, my father tells this great little anecdote: 'you're walking down a country road when you happen upon a fence. On one of the fence posts, you see a turtle – now, you know he didn't get up there all by himself.' I take this to mean that no matter how high you get in life, it's never because you were the only one working for it. Somewhere along the way, you get a little help. For this journey, I have had much help, and I have many to thank.

To Professor Paul Wilkinson, who unquestionably is the only reason why this thesis was ever able to come together. If not for his assistance, support, and endless patience, this work would most likely still be in piles on my study floor. I am greatly indebted to him for all of his efforts toward the completion of this work, and for his tireless encouragement along the way. The opportunity to study under his mentorship has been, to say the least, an honour.

To Dr. Bruce Hoffman, my original supervisor who endeavoured to take on this project. While I learned very little about terrorism, or even International Relations under his tutelage, I did learn perhaps the three most important things I will need to know aside from pursuing a Ph.D.: 1) how to write; 2) how to argue; 3) how to grow a very thick skin when I don't do either one of these things particularly well. For life's lessons well taught, I thank you.

To Professor Nick Rengger, who offered secondary supervision after Dr. Hoffman went on to pursue bigger and better things. His insights and instruction have been paramount in developing the structural model and theoretical base for this work. For this as well as access to his seemingly exhaustive collection of reference material, many thanks.

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> *Lt. General Brent Scowcroft*, thank you, Sir, for sharing the wisdom gained from an incredible lifetime of experience. For letting me ask my naïve questions about the world, and for not laughing aloud when they were way off the mark. But most of all thank you for letting me just sit-in all those times and just 'listen'.
>
> *Virginia Lampley*, who has more than anyone, provided the single greatest impact on my adult life, and she may never fully understand how thankful I am, or how much she has done to change my life and my future for the better. She has enabled things I never thought possible, and has opened doors to opportunities I never would have had the courage to consider. For her role as mentor, I am forever grateful, and deeply indebted; but for her role as friend, I am forever thankful.
>
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>
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getting the Ph.D. – to *I will do anything to get Melby off my back.* Well, Melby, it's done. Here it is. Finished. And now, you owe me lunch!

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On September 8, 1996, my parents were involved in a near fatal car crash. In the event I needed to be reminded how much my family means to me, and how little my accomplishments mean without them, this certainly placed it on the forefront. Receiving that phone call was like having the rug pulled out from beneath me, and as I lay on my back flailing, I quickly realised who my tried and true friends are, because they were the ones picking me up and putting me back on track. Without them, it is doubtful I would have returned to the path I was on, and for you, I am thankful in a way that words could ever express. Thank you; Lord, for bringing into my life:

> *Erik Chaves*, I never know where the hell you are – until I'm in trouble, and then you always seem to find me! Buddy, for the many years you've played this role, I am so very, very, grateful.
>
> *Chris Sabatini*, one of my oldest and most trusted friends. For never questioning the stupid things I do, but for always digging me out in the end, I am forever grateful.
>
> *Gus Xhudo*, where do I start? It's been 12 years and neither one of us still knows what we want to be when we grow up. But I can't think of anyone else I would rather grow-up with. You've been a teacher, a mentor, a confidant, a big brother, and at times, a royal pain – but unquestionably you are one of the

best friends I could ever wish for. I am truly blessed. Who's better than you, eh? Goody-goody!

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To my sister Cindy, my little Mouse, my little "**Dr.**" Mouse! Few things have ever given me so much happiness than to see that title bestowed upon you. And nothing has ever brought me so much joy than to know after 28 years of always being the second in line, you beat the big sister to the big title. I love you and I'm proud of you – always!

To my Mother and Father, for stressing at a very early stage, the importance of education, and intellectual curiosity, and for providing the environment in which to foster that. For always pushing me to do better, until I learned to push myself, and for taking the edge off, before I was about to fall over it. You have each been, respectively, my role model, and my hero, throughout my entire life, and especially throughout this project. Unlike Dad's turtle on the fence post, I do know how I got here – and I could never have done it without you. Thank you!

No accomplishment can ever be enjoyed without someone to share it with, and I could never enjoy this one without knowing that I have my family, *alive*, to share in its successful completion. It is to my family that this work is dedicated: my Mother, Julia, my Father, Lester, and my sister, Cindy. For your love, support, encouragement, and unfailing belief in me. Thank you! I love you!

- Wendy
8 September 2001

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Chapter One

Introduction: Context, Scope, and Framework for Discussion

> *From the point of view of our government - of any democratic government - there are always two objectives: to save the lives of citizens and, at the same time, not to lose credibility or independence or stability. The task is harder than it seems. The government must act in a context of intense domestic political pressure to "do something"; must avoid directing anger against any sizable segment of the population, a step that in the long run creates instability and encourages support for violent opposition; and must deal with the fears that its responses are sure to create among any people wise enough to know that government is most dangerous when it claims to be fighting dangerous enemies. Often, it must at the same time worry about its international relations with both enemies and allies. Its decisions are influenced by bureaucratic competition among law enforcement and intelligence agencies at federal and local levels, each of whom may think it knows best how to prevent further violence and how to bring perpetrators to justice. In such a complicated game, even a government that plays its cards perfectly may not have a winning hand.*[1]

1.1 Introduction

It is the intention of this work to introduce, discuss, and evaluate through empirical case study analysis, the value of extradition as a method of combating international terrorism. While acknowledged that this is a unique problem in many areas of the world,[2] this discussion frames the perspective of the American experience with terrorist extradition. Regardless of the geographic focus, however, the task at hand not an easy one. Extradition encompasses aspects of both the legal process, and of political will. The extent to which either one or both take part in compliance to international norms of law is very difficult to measure. It is not a new concept; the influence of politics on legal decision-making has always been a part of the system.

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[1] Philip B. Heymann, Terrorism and America A Commonsense Strategy for A Democratic Society, (Cambridge, Massachusetts: The MIT Press, 1998), pp. xi-xii.

[2] Extradition between France and Spain regarding members of ETA for example, or between the Irish Republic and Great Britain. See: B.W. Warner, "Extradition Law and Practice in the Crucible of Ulster, Ireland and Great Britain: A Metamorphosis?", Paul Wilkinson and Alasdair M. Stewart eds, Contemporary Research on Terrorism, (Aberdeen University Press, 1987).

Terrorism is not new subject matter; there is much written and discussed on terrorism, especially in its relationship to law. Nevertheless, an examination of the political relationship between extradition and terrorism, and a discussion of the key issues and problems that surround the adoption and implementation of its legal character, is worthy of study.

1.1.1 Nature and Scope of the Issue

This is not a study of the legal analysis of extradition, nor should it be classified as a study in international law, but rather international relations. This is a study of extradition as a process, and as a tool. It explores the legal and political nexus of the relationship between extradition and terrorism, and measures its application as an effective combatant to terrorism. While the nature of extradition does have legal properties, its implementation and success often depends largely on the political influences that surround it.

Extradition operates on both international and domestic levels, allowing the transfer of alleged criminal fugitives between states thorough bilateral or multilateral arrangements, which are predetermined or arranged on an ad hoc basis. The process of extradition, however, is implemented and decided upon in the courts. There is a voluminous amount of case law available on extradition cases in general, but they are not the focal point of study. Terrorist extradition will be the focus of discussion, for two reasons; first, because it is an interesting aspect of extradition case law, and second, the political aspect of extradition law provides the best example in which to measure political influence.

Terrorism adds a unique perspective to the question of extradition due to the inherent inability to differentiate it from other definable threats of violence or crime. The existing international framework of law does not and cannot adequately deal with terrorism, due to these definitional challenges. The United Nations, the centre of international law, has tried and failed in their efforts to achieve an overall condemnation of terrorism - as member states on both the Security Council and General Assembly, have repeatedly wavered on the semantics of it's definition.[3] The individual efforts of western liberal democracies towards domestic and international terrorism, however, has proven slightly more effective, and in some cases even successful. It remains a perpetual challenge, to mount an effective response towards terrorism especially in a democratic context, and as noted by Paul Wilkinson,

> *"One obvious but extremely important factor is the inherent civil rights and freedoms of the liberal states which terrorist organizations can exploit. Freedom of movement both between and within liberal states, freedom of association, and freedom from totalitarian style police surveillance and control, are all rightly highly valued by citizens of Western liberal states. Yet they can be all too easily taken advantage of by terrorists. They can slip quickly across frontiers if police interest becomes too close."*[4]

The legal challenge inherent in extradition, ostensibly, is that there exists no one comprehensive international criminal system. Whether or not an offence qualifies as a crime is more a question of empirical study than it is absolute fact; and there are instances when a crime committed in one state does not constitute a crime in another. Still some crimes are so reprehensible that they are considered prosecutable wherever the perpetrator is found. Nevertheless, there are no hard and fast rules that apply to all

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[3] Only in the mid to late 1980's did the UN begin to make progress toward a condemnation of terrorism. See: Seymore Maxwell Finger, "The United Nations and Terrorism", in Charles W. Kegley, Jr., (Ed.), International Terrorism: Characteristics, Causes, Controls; (New York: St. Martins Press), 1990, pp. 259-61.

states in these circumstances. Issues of jurisdiction are also prevalent, as are issues of rendition other than extradition, where extradition overlaps into other fields of law. There are occasions that give rise to the ability to surrender fugitives through methods that do not include extradition, but are nonetheless legal, effective, alternatives that work outside the boundaries of the tedious process of extradition. These concepts are given a substantial amount of detailed attention later on in the discussion, as are other alternatives to the legal process.[5]

As noted by Geoff Gilbert,

> *"[p]art of the problem of extradition is in trying to achieve the correct balance between allowing a free flow of fugitive criminals to states where they may be prosecuted for their crimes, and in safeguarding the fugitive from oppressive punishment or from persecution on account of his personal characteristics, beliefs, or opinions."*[6]

In formulating the theory, implementation and practice of extradition law, one cannot divorce the legal process from the politics of international relations that encumber it. Embedded in every request for extradition, there lies an element of foreign policy, and often this is the dominant factor in the outcome of an extradition case. This is especially true when taking into account the special circumstance of terrorism; an illustration, such as the Lockerbie case, best illuminates this. Lockerbie remains perhaps the single best example of the political relationship between extradition and terrorism to date.

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[4] Paul Wilkinson, Terrorism and the Liberal State, (London: MacMillian, 1979), p. 103.

[5] Discussions prevalent in both Chapters 6 and 7.

[6] Geoff Gilbert, Aspects of Extradition Law, (Dordrecht, Netherlands: Martinus Nijhoff, 1991), p. 4.

1.1.2 The Lockerbie Example

On December 21, 1988, Pan Am flight 103 from London to New York exploded at 31,000 feet over Lockerbie in southern Scotland, killing all 259 on board and 11 people on the ground.[7] Subsequent investigations concluded that a bomb in the planes cargo hold caused the explosion. The case was closely linked with the French investigation into UTA flight 772 from Brazzaville to Paris that exploded over Niger a year later,[8] with strong suspicion of Libyan involvement.[9]

Following a three year investigation, the Lord Advocate, Scotland's chief law officer, obtained a warrant for the arrest of two Libyan intelligence agents, Abdel Baset Ali Mohamed al-Megrahi, and Al-Amin Khalifa Fimah, pending charges[10] of conspiracy, murder, and contravention of the Aviation Security Act of 1982. The U.S. courts followed with an indictment containing similar accusations.

The governments of the United States and the United Kingdom issued a demand for extradition of the two Libyan officials[11] based on Article 7 of the 1971 Montreal Convention of Unlawful Acts against the Safety of Civil Aviation, which provides the

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[7] See: "Fast Facts on Lockerbie", BBC News, Online Network, August 24, 1998, at: http://news.bbc.co.uk/hi/english/lockerbie/newsid_156000/1566062.stm

[8] UTA Flight 772 exploded over Niger September 19, 1989. See: Paul Wilkinson, *The Lessons of Lockerbie*, Conflict Studies #226, (Research Institute for the Study of Conflict and Terrorism), December 1989.

[9] On October 30, 1991 a French examining magistrate issued arrest warrants against six Libyan officials for their alleged involvement in the UTA bombing.

[10] For a list and discussion of these charges see: http://www.law.gla.ac.uk/lockerbie/index.cfm

[11] The demand states: "The British and American Governments today declare that the Government of Libya must:
surrender for trial all those charged with the crime; and accept complete responsibility for the actions of Libyan officials;
disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
pay appropriate compensation
We expect Libya to comply in full."

basis of obligation for prosecution against those who commit aircraft sabotage. Libya refused these demands under the same convention,[12] citing that Libya is under no obligation to extradite its own nationals.[13] In response, the U.N. Security Council issued two resolutions; Resolution 731 on January 21, 1992[14] requesting the surrender for trial of the suspects, which was refused by Libya, followed by Resolution 748 on March 31, 1992.[15] The latter was an actual demand for Libya to renounce terrorism and 'surrender', not extradite, the two suspects al-Megrahi and Fhimah. The resolution gave two weeks for full compliance, at which point a range of sanctions would be, and eventually were, imposed on Libya. After 18 months, when the two

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See: U.N. doc. A/46/827;S/23308, Ann.

[12] Libya did not, until January 18, 1992, invoke the Montreal Convention as the basis of its refusal to surrender the suspects. In a letter to the United States, Libya argued: "out of respect for the principle of ascendance of the rule of law and in implementation of the Libyan Code of Criminal Procedure...as soon as the charges were made, Libya immediately exercised its jurisdiction over the two alleged offenders in accordance with its obligation under article 5, paragraph 2, of the Montreal Convention by adopting certain measures to ascertain their presence and taking immediate steps to institute a preliminary enquiry. It notified States...that the suspects were in custody...

As a State party to the Convention and in accordance with paragraph 2 of article 5, we took such measures as might be necessary to establish our jurisdiction over any of the offences... because the alleged offender in the case was present in our territory.

Moreover, article 7 of the Convention stipulates that the Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution and that those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state."

See: U.N. doc S/23441, Ann

[13] Because Libya had begun it's own investigation and had initiated proceedings, legally they not obligated to extradite nationals against whom proceedings have already been instituted. See: Cherif M. Bassiouni and Edward M. Wise, eds. Aut Dedere Aut Judicare, (Dordrecht: Martinus Nijhoff Press, 1995), p. 58. For additional discussion in detail on the extradition requests, the U.N. conventions and potential implications, see: Alfred P. Rubin, "Libya, Lockerbie and the Law", *Diplomacy & Statecraft*, Vol. 4, No. 1, March 1993, pp. 1-19.

[14] For a summary in greater detail of UN Security Council Resolutions which pertain to the Lockerbie case see: *University of Glasgow School of Law, Lockerbie Trial Briefing Site*, at http://www.law.gla.ac.uk/lockerbia/index.cfm under "Summary: Security Council Resolutions", and "Challenges to the Resolutions".

[15] Ibid.

Libyans were still not handed over, the sanctions were extended and tightened by the Security Council in Resolution 883 on November 11, 1993.[16]

After nearly seven years of failure to obtain the custody of the two Libyans indicted for the bombing, the U.S. and the U.K. were prepared to drop their insistence[17] that the two men be tried in either the U.S. or the U.K. Instead, they were prepared to participate in the unorthodox suggestion of transplanting the Scottish court that would have the jurisdiction to try them, to a neural venue at The Hague.[18]

On April 20, 1998, during a meeting with a representative of the victims of the December 1988 bombing of Pan American Flight 103, Libya's revolutionary leader, Momar El-Gadhafi promised to surrender two alleged members of his national intelligence service, both of whom are suspected in the bombing incident. One year later, Gadhafi made good on his promise and handed the suspects over to the United Nations Legal Chief, and the suspects were extradited to The Hague in The Netherlands.[19] The two men, Abdel Basel Ali Mohamed al Megrahi, and Lamen Khalifa Fhimah, were extradited to Scottish jurisdiction at Camp Zeist, a former American airbase, outside Utrecht, Netherlands, a location agreed upon by British and Dutch governments as the most suitable for trial. It was here where they were

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[16] Ibid.

[17] Associated Press, "U.S. Compromises in Lockerbie Bombing", *New York Times*, August 24, 1998; Associated Press, "U.S. OK's Libyan's Trial at Hauge", *the New York Times*, August 24, 1998.

[18] Associated Press, "U.S., U.K. Back International Trial of Lockerbie Suspects", *Los Angeles Times*, August 24, 1998; see also: "Anglo-U.S. agreement on Lockerbie trial" http://news.bbc.co.uk/hi/english/lockerbie/newsid_157000/157536.stm and "Lockerbie trial: euphoria and reserve", http://news.bbc.co.uk/hi/english/lockerbie/newsid_157000/157412.stm . For Scottish press views on decision see: "Cook looks to world leaders in quest for Lockerbie justice", *The Scotsman*, August 25, 1998; and "Trial would be a Scottish affair but Scots would pay the price", *The Scotsman*, August 25, 1998.

[19] See: *"Chronology of the Lockerbie Case", Associated Press - Lockerbie Report Archives*, Lockerbie Trial Briefing Site, http://www.law.gla.ac.uk/lockerbie/index.cfm.

eventually arraigned and tried under Scots law for murder, conspiracy to commit murder, and violation of international aviation laws.[20]

In February 2001, Abdel al-Megrahi was convicted, unanimously by the court, of murder in the bombing of Pan Am flight 103. The other defendant, Lamen Khalifa Fhima, however, was acquitted.[21] The Scottish judges in their ruling acknowledged the weakness of the prosecution case, and evidence; however, they concluded the sum total of the evidence was sufficient to establish Megrahi's guilt.[22]

Lockerbie remains one of the worst terrorist attacks in the History of the United States, and the worst cases of mass murder in Britain since in modern history. The effects of Lockerbie were to be more profound and long-term. After nearly eleven years of legal dispute, UN sanctions, and diplomatic stalemate that followed since the bombing occurred, the U.K. had the opportunity to adjudicate one of the most notorious if not the most publicized acts of terrorism to date. There were massive political undertones in order for this to actually take place, which took the form of a series of trade-offs. For the United States, the extradition of the two men depicts a sense of diplomatic and political "victory" for their hard-line stance on terrorism and their sanctions policy toward Libya, which has spanned a better part of two decades. For Libya, the hand-over of the suspects provided the opportunity to rejoin the

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[20] As of this writing the trial is currently underway. This is the first instance where a Scottish criminal court has convened abroad, the first time in Scottish legal history where charges this severe will be heard without a jury, and is anticipated to be the largest if not the most expensive trial in Scottish legal history.

[21] For the full 82 page court opinion (Case No. 1475/99) in PDF file format see: http://www.scotcourts.gov.uk/download/lockerbiejudgement.pdf

[22] Ibid at pp. 81-82; see also: Howard Schneider, "Gaddafi Dissects Lockerbie Decision", *The Washington Post*, February 6, 2001, p. A14.

international mainstream and participate in a booming global economy,[23] now that sanctions are eased with the release of the suspects. The years as an international pariah appeared to be ending for Gadhafi, a reputation he had done much to court. For the families of the Lockerbie victims, the trial outcome provided a sense of closure for some. Whether or not victory is a legitimate claim remains to be seen. In addition, there have been several legal avenues left yet to explore, such as potential compensation to the victim's families; the appeal by Megrahi still pending; and the potential for further criminal investigation to see who else may have been involved. However, it can not be plausibly denied that there was in fact *some form* of retribution, some shard of justice served: this was not an incident that went totally unpunished, ignored, or forgotten like so many have in the past. The accused were extradited, tried, and one was convicted. There was *something* done, and something is, and always will be, better than nothing at all.

The example of Lockerbie is meant to demonstrate the heart of what this thesis is about, the political relationship between extradition and terrorism. The problem, simply stated, is the potential to uphold the rule of law and defeat terrorism is often undermined by political will, which weakens the existing treaties and conventions established to address and resolve the very issue. Despite the broad array of legal agreements available, there remains the lure to default to alternatives outside of extradition, in order to avoid the political trappings of the formal process. These alternatives, however, by their very nature are by default political. There remains,

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[23] Two interesting articles regarding Libya's enthusiasm to rejoin the world economy and desire to end sanctions, see: Adam Zagorin, "Why Libya Wants In", *Time*, March 27, 2000; and Andrew Cockburn, "Libya, An End To Isolation?", *National Geographic*, November 2000.

then, a need to assess more cogently, the value of extradition as a method of combating terrorism.

1.2 A Brief Historical Overview

Extradition as a practice can trace its roots back to the thirteenth century. There is evidence that a treaty of extradition existed in 1280 B.C. between Rameses II the of Pharaoh Egypt and the Hittite King Hattusili III detailing a provision relating to the return of fugitive offenders between various provinces,[24] concluded after the Hittite's attempt to invade and conquer Egypt.[25] During the time of the Roman Empire, however, this likely meant that fugitive offenders were enemies of the state, and not technically criminals, but perhaps the first political asylum seekers.

It is, in fact, in this aspect that extradition laws have changed over the centuries, which is the aspect concerning political asylum.

Extradition itself is largely a development from the theory of asylum, its beginnings emanating from the time of the ancient Greeks, where asylum was granted freely to everyone, not just to political offenders.[26] This differed greatly from the Middle Ages, where the sole purpose of extradition was to hunt down political fugitives that fled to other jurisdictions in order to escape punishment.[27] This was very much a sign of the times, as monarchs all shared one common interest, which

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[24]Peter Sutherland, *The Development of International Law of Extradition*, Saint Louis University Law Journal, Vol. 28:33, 1984.

[25] Christopher L. Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: a brief History*, Boston College of International and Comparative Law Review, Vol IV, No. 1, 1981.

[26] Blakesley, PRACTICE at note 4.

[27] Ian Shearer, Extradition in International Law, (Manchester University Press) 1971, p. 166.

was to punish, or execute, those individuals who sought to overthrow their regimes, and extradition of this age was almost completely, entirely, political. The example of the first British treaty of extradition between William of Scotland and Henry II of England in 1174 is particularly poignant as it concluded the surrender of felons that fled between the two countries. The treaty was unique as it allowed the provision of trial by the courts in the asylum state as an alternative to surrender. From this time in 1174 until Scotland assimilated into the Union in 1707, a continuous stream of extradition between the two countries was readily apparent.[28] The 1303 Treaty of Paris, between Edward II of England and Phillippe le Bel of France, accomplished much of the same. Political in nature, its main purpose was to return political enemies of the respective sovereigns.[29]

Even up into the late seventeenth century, the majority of most major extradition agreements remained political, the most dramatic example being that of Louis XIV and his Edict of Nantes, disallowing emigration. As a result, of his order many of the inhabitants from the *City of Gex* fled. Louis demanded of the magistrates to order the return of the fugitives, which the Magistrates did, but most of the deserters still did not return. Louis demanded again their return to the Magistrates under fear of penalty if they did not return, essentially ordering citizens to deliver expatriates to the crown under fear of punishment.[30]

Modern extradition first made its historical debut in early in the 18th century, in the treaty between France and Holland 1736, which applied to the extradition of

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[28] Paul O'Higgins, *The History of Extradition in British Practice, 1174-1794*, The Indian Yearbook of International Affairs, 78:108, 1964, p. 80-81.

[29] Ibid at note 5, p. 48.

[30] Ibid.

individuals charged with committing 'common crimes'.[31] France continued an uncontested role in the development of modern extradition throughout the 18th and 19th centuries, which would include bilateral treaties with all of their neighbours except for Great Britain.[32] The basis for modern procedural characteristics of extradition were developed largely during the latter half of this time period, including the use of the political offence exception, which acted as a proscriptive limitation to extradition.

While France was the comparatively stronger in terms of influence in modern extradition law, the judicial decisions, or case law decisions, of the United States were equally important in the formation of modern extradition law. The foundation of this demonstrated in one of the first treaties between the United States and Great Britain, also know as *The Jay Treaty of 1794*;[33] and again between the United States and France, which was the first to include the political offence clause.[34] These were largely predicated on the basic tenants of extradition law as developed by the French,

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[31] Shearer, EXTRADITION p. 8.

[32] Blakesley, PRACTICE p. 51.

[33] Article 27 reads:
"It is further agreed that His Majesty and the United States on mutual requisitions, by them respectively, or by their respective Ministers or officers authorized to make the same, will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the fugitive."
For a copy of the Jay Treaty see: http://www.yale.edu/lawweb/avalon/diplomacy/jay.htm

[34] The Convention for the Surrender of Criminals: 1843, Article V states:
"The provisions of the present Convention shall not be applied in any manner to the crimes enumerated in the second article, committed anterior to the date thereof, nor to any crime or offence of a purely political character."
For the complete text of the Convention, see: http://www.yale.edu/lawweb/avalon/diplomacy/fr-1843.htm

and ultimately set the trend for the development of extradition law in the United States.

The prominent historical debate in the U.S. centred on whether or not the extradition of fugitives in the absence of an existing treaty obligation was a requirement. The *U.S. v. Robins*,[35] in 1799 was the first such case to consider this aspect, but it was not until 1840 in *Holmes v. Jennison*[36] when the Supreme Court ruled that that no obligation to extradite a fugitive exists outside of that which was imposed by treaty law. The court reasoned that if extradition occurred outside the obligation imposed by treaty, it is because of the commonality and the discretion of the two governments that were party to that agreement.[37] This sentiment remained true in U.S. case law through the 20th century. The 1947 case of the Soviet national accused of embezzlement did not lend to extradition to the Soviet Union. The U.S. referred the Soviet government to the fact that established principles of international law do not account for extradition outside of treaty law.[38]

Though it may be an established principle of U.S. case law to refuse extradition in the absence of treaty obligation, it does not prevent the U.S. from *requesting* extradition from countries in the absence of treaty obligation.

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[35] 27 Federal Cases 825 (1799), No. 16, 175)

[36] *Holmes v. Jennison*, 39 U.S. (14. Pet) 540 (1840)

[37] *U.S. v. Rauscher*, 119, U.S. 407 (1866)

[38] Blakesley, PRACTICE p. 58

1.2.1 Extradition as a Process

How does extradition happen? It is not a self-executing principle, but one that is born out of process. Extradition is treaty governed and regulated between countries using bi-lateral diplomatic treaties. Certain states with close diplomatic ties, for example, will have specialized agreements suited to their own particular situation. Examples of this include the United Kingdom and Ireland,[39] Australia and New Zealand, or the U.S. and Canada. Within the language of the treaty are the specifications of certain acts that are extraditable crimes. Also within the scope of the treaty, are the procedures and safeguards that stipulate the extradition relationship.[40]

The first step in any extradition request is to inform the proper authorities, usually the central government's law enforcement authorities in the requested state of the fugitive's presence. The method for achieving this is in the language of the treaty, and takes the form of diplomatic channels requesting the issuance of a warrant for the surrender of the fugitive; or the requesting state may submit an application for a warrant of arrest directly to a judge. In the case of the former, the request must be backed by sufficient evidence to convince the government of the requested state's judiciary and criminal investigations branch that extradition is appropriate. In the case of the latter, the judge is obligated to keep the branch of government which has jurisdiction over these matters informed of the outcome of the proceedings.

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[39] For reference see: Paul O'Higgins, HISTORY.

[40] For further discussion see: Geoff Gilbert, ASPECTS.

Once the fugitive is arrested, the presiding judicial officer may either set or deny bail,[41] and a writ of habeas corpus can only be filed after prolonged detention and if no charges have been filed.

The judicial phase is the extradition hearing,[42] which does not determine guilt or innocence, but rather the susceptibility of the fugitives surrender. After a hearing and if necessary, the appeal, the courts determine whether the fugitive will be surrendered. Assuming the fugitive is to be surrendered, the matter is left to the executive branch to render a final decision on the case before signing the authorization, or extradition order.[43]

There is, in addition, the issue of political offence, for which no uniform substantive procedure is established. Because the political offence exception makes the subject 'nonextraditable', it places an additional burden on the court to prove the relativity of the political nature of the crime, to the criminal act committed. Historically, as discussed above, political offences have been dealt with as either relative offences, committed in connection with a political act; or purely political offences. However, if the nexus between the crime committed, and the political act are sufficiently close, then the offence is judged as a relatively political offence. This issue will be dealt with at some length later on in the study. However, it is important to introduce here the concept of how political offence can affect the outcome of extradition, even though the crime may appear to be a criminal act. The charge of

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[41] See: Steven Lubet and Morris Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, The Journal of Criminal Law and Criminology, Vol. 71, No. 3, 1980.

[42] Ibid.

[43] Ibid at note 20, p. 206.

political offence obviates the need for any factual determination, as political offences are never extraditable.[44]

One final point that affects process of extradition and the decision to render a fugitive to the requested state is the issue of double criminality.[45] The essence of this concept is very simple; the fugitive should not be returned to the requested state unless the act committed is prosecutable in both the requesting state and the asylum state.

1.2.2 Multilateral Agreements

In addition to bilateral agreements, there exist several multilateral agreements in the form of conventions; many of these are referenced throughout the work, in particular in the case studies in which they are directly applicable. However, it should be mentioned up front that multilateral conventions also play a role in the evolution of extradition, and an equally important role in the evolution of the process.

While efforts made through the United Nations to deal with the problem of terrorism, usually as they apply to specific acts, for example: hijacking, piracy, or the protection of diplomats, present inherent problems. The most obvious difficulty is enforceability of these agreements, as evidenced in the *Lockerbie* discussion above; there is little that can be done to enforce these measures, other than the possibility of sanctions, which also must be a multilateral effort. There is always the obstacle of member states sympathetic to the cause of the terrorist organization, in particular

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[44] *Ibid* at note 23, p. 207

[45] For greater in-depth handling of this issue see: Gilbert, ASPECTS pp. 47-54;

those groups that purport to operate with the goal of achieving self-determination. In contrast, bilateral agreements are not as prone to this obstacle.[46]

There have been recent attempts to bring a greater convergence in matters of criminal codes that deal with identifying terrorist offences. The International Convention for the Suppression of the Financing of Terrorism,[47] for example, passed in December 1999, compensates for the existing multilateral agreements that do not address the issue. The Resolution calls for greater international cooperation among States in "devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators."[48]

The issue of convergence is a poignant example of how states are able to necessitate changes in national law through the ratification of these international conventions. It is the standard bearer as to how the politics of extradition are changing within the international community through changes in the convergence of laws which govern these types of matters. The easing of laws, the increase in cooperation, are what lead to the success of extradition cases, and which are widely discussed in many of the international conventions which deal with specific matters involving extradition. However, while these conventions are good, they are not good enough. Domestic laws also need to change if compliance to international law is to be

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[46] See: L.C. Green, *Terrorism and the Courts*, Manitoba Law Journal, Vol. 11, No. 4, 1981

[47] For Convention see: http://www.un.org/law/cod/finterr.htm

[48] Ibid at *Preamble*.

carried out. This is not an 'either-or' case; changes on both the international and domestic levels must be sought in order to make progress.[49]

Multilateral agreements can greatly help by encouraging a convergence in the criminal codes of states to deal with terrorist crimes. Extradition is far more likely to work as a tool of combating terrorism if there is an increase in international agreement on establishing extradition procedures and safeguards. The Council of Europe and the European Union have negotiated useful conventions in order to bring about a greater convergence in these matters. Perhaps the most illustrative example are the measures put forward by The Council of Europe Parliamentary Assembly, which has come out in favour of stepping up police and judicial cooperation throughout the European continent to allow for more effective measures in fighting terrorism. The Council has adopted a recommendation which prioritises improving the effectiveness of the two European Conventions which deal with terrorism. The 1977 European Convention on the Suppression of Terrorism[50] would broaden the definition of criminal offences of a terrorist nature to include "preparatory acts" (preparation of attacks, membership to associations, and financing or provision of logistics). In addition, there would be revisions to "Article 18", which prevents states from extraditing fugitives on grounds of political offence.[51] The second recommendation would apply to the 1957 European Convention on Extradition,[52] and would call for

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[49] Jeffrey B. Gaynes, *Bringing The Terrorist To Justice: A Domestic Law Approach*, Cornell Journal of International Law, Vol. 11, 1978, p. 73.

[50] See: European Convention on the Suppression of Terrorism, Strasbourg 27.I.1977 at: http://conventions.coe.int/treaty/en/Treaties/Html/090.htm

[51] *Combating Terrorism: Assembly calls for greater police and judicial cooperation Europe-wide*, September 23, 1999, Council of Europe web site: http://press.coe.int/cp/99/478a(99).htm

revisions to be applied concerning the definition of a political offence, and to simplify extradition proceedings with specific measures put in place to prevent the abuse of the right of asylum.[53] Convergence of law on these matters not only strengthens the possibility of extradition of fugitive terrorists, but also increases, significantly, the prospects for international cooperation on terrorism matters.

1.2.3 Alternative Methods of Rendition other than Extradition

This is an area of crucial importance, which was introduced above, and will be discussed at much greater lengths later on in the study. Chapter 6 deals exclusively with the topic area that focuses on what methods are available to states if extradition is not an option, noting that this is often prevalent with states that act as sponsors of terrorism. However, even with states where extradition is a possibility, there remains the practice of other forms of cooperation that do not involve the courts or the executive branches, rather they transpire on lower levels of cooperation, between governmental agencies such as between law enforcement. The practice of rendition, discussed in Chapter 7,[54] is such a case, where a fugitive is surrendered by means agreed to by both states. Rendition can be a willing arrangement, or as discussed further on, can also be coerced. Moreover, not all means of rendition are regarded as legal by the state from whence a person is sought. The U.S. use of its concept of extraterritorial jurisdiction leading to seizure of a suspect may be viewed as abduction by the state from where the suspect is seized. Consider the case of Fawaz Younis.

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[52] See: European Convention on Extradition, Paris, 13.XII.1957 at: http://conventions.coe.int/Treaty/EN/Treaties/Html/024.htm

[53] EUROPEAN CONVENTION.

Middle Eastern terrorists hijacked a Royal Jordanian airliner in 1985 with two Americans aboard. There were no fatalities, although several passengers and crew members were badly beaten and the airliner was blown up on the ground in Beirut, and the brains behind the operation, Fawaz Younis, of the Lebanese Amal militia, escaped.[55] Two years later, Younis was lured to a luxury yacht off Cyprus into international waters and captured by U.S. agents, brought back to the United States for trial, and convicted in what Time magazine called "the most important test yet of the nation's attempt to apply law and order to international terrorism."[56] On October 4, 1989, Fawaz Younis was sentenced to 30 years in prison for the commandeering of the Jordanian jetliner.[57]

Although not a U.S. example, there is one other very poignant example of this type of state response concerning the illegal rendition of fugitive criminals, which is the May 1960 abduction and trial of Adolph Eichmann.

Adolph Eichmann was accused of participating as a principal architect and the principal executor and personally responsible for carrying out Hitler's Final Solution, which would include the genocide of six million European Jews.[58] In May 1960, Adolph Eichmann was abducted in Argentina by Israeli Mossad agents[59] and brought to Israel for trial. The Argentinean government protested and brought a complaint

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[54] See Chapter 7.4 Extradition –v. – Rendition.

[55] See: Larry C. Johnson, The Fall of Terrorism, at: http://www.securitymanagement.com/library/000338.html; AFIO Intelligence Notes Issue 41, 26 October 1998, at: http://www.afio.com/sections/wins/1998/notes41.html

[56] Salon newsreel at: http://www.salon.com/news/1998/12/11news2.html

[57] Associated Press Reports, October 4, 1999.

[58] Isser Harel, The House on Garibaldi Street, (London: Frank Cass, 1997).

[59] Ibid.

against Israel in the United Nations Security Council for violating international law, which the Council upheld under the principle of territorial integrity.[60] The Council insisted on appropriate reparations be made to Argentina, to which the Israeli's responded by offering a full public apology. Argentina accepted, and that was ultimately considered full reparation.[61] Eichmann was tried in Israel for Genocide and War Crimes against Humanity before a specially convened court in Jerusalem.[62] The legal position taken on this is even though such an extreme exercise in extra-territorial jurisdiction transpires; the actual claim of the country involved to try the individual obtained depends on the extent to which its own courts will affirm their jurisdiction.[63] Since most common law courts will not question the manner in which the accused is brought before them, even though it may be clear that the government, through the use of its Agents, have breached international law using methods to secure the accused individual.[64] On December 2, 1961, Eichmann was found guilty and sentenced to death. Eichmann was executed on May 31, 1962, and is historically, the only execution ever to be carried out in Israel's history.[65]

The point here is that rendition does not always entail an amicable relationship between two states. As will be discussed further on in Chapter 7, this alternative

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[60] Louis Henkin, How Nations Behave, Law and Foreign Policy, Second Edition, (New York: The Council on Foreign Relations, 1979), p. 270.

[61] Ibid.

[62] Isser Harel, GARIBALDI STREET, p. 285

[63] L.C. Green, *International Crimes and the Legal Process*, International and Comparative Law Quarterly, Vol. 29, October 1980, p. 574.

[64] Ibid. See also: L.C. Green, *Legal Aspects of the Eichmann Trial*, Tulane Law Review, vol. 37, 1963.

[65] Ibid.

method of extradition does have an impact on the integrity of the law, and the effectiveness of the use of extradition as a useful international tool.

There remain other options, such as exclusion, or deportation; and as will be evidenced in discussion further on, are options often in a final attempt to invoke the law and prevent fugitives from escaping. These alternative methods are not employed as prospects for working outside the boundaries of the law, but rather to avoid the formal obligation of extradition, and all the nuisances that accompany it.

1.3 Objectives

Beyond the general introduction of the problem, the study is conducted on three levels with the objective of developing the discussion of the political relationship between extradition and terrorism.[66]

First, it develops a framework for analysis, which will allow empirical evidence to be applied to the principles of law and international relations. It accomplishes this on two levels: 1) by arguing for an integrated framework and 2) providing a path of argumentation for study. In taking into account the purpose of the study on a whole, development of this framework is of particular importance, because it creates the *context* for the way extradition and terrorism needs to be thought about. As previously discussed, extradition is not a pure legal issue; the methods by which it is

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[66] The structure discussed in this section is consistent with, and closely related to the Controlled Comparison: Design and Implementation study configuration used in Alexander George's method of structured, focused comparison. It addresses the task of using heuristic cases studies as building blocks for development, and distinguishes three phases of study different from, but yet closely resemble, the three phases outlined in George's work which are as follows:
Phase 1 the design and structure of the study are formulated.
Phase 2 the individual case studies are carried out in accord with the design.
Phase 3 the investigator draws upon results of the case studies in order to assess, reformulate, or elaborate the initial theory stated in Phase 1.
See: Alexander L. George, *Case Studies and Theory Development: The Method of Structured, Focused Comparison*, in Theory and Policy, (New York: Free Press, 1979), p. 54.

used invoke strong political undertones. A framework then, must take into account both legal and political aspects which allow for a cross disciplinary study with the ability to understand the empirical evidence *in the context in which it occurs*. There is a considerable amount of time spent on this aspect, which is unavoidable. It should be understood from the very start, however, that this is not a study of theory. It is a study of extradition. While there is a generous amount of cross-disciplinary discussion, on the complex relationship between international law and international policies, the purpose is to provide a conceptual framework for thinking that will consider what does *not* work, as well as what does. This provides the peg for the remainder of the empirical discussion.

The second level will discuss case studies[67] involving the U.S. and relevant to the topic of extradition and terrorism, by identifying the major issues and problems faced by the U.S. authorities and the problem of state response regarding terrorist extradition. This is broken into four topic areas: international cooperation, the politics of cooperation, alternatives for traditional bilateral interstate extradition, and the evolution of terrorist extradition. Each of these is discussed in more detail in the *Chapter Outline* section of this chapter.[68] The objective is to examine empirically the overt issues and challenges faced by the relationship between extradition and terrorism.

The third level, will dissect the underlying themes that are the essence of the study, or 'sub themes' that are not mentioned outright, but which bring out the fundamental issues behind U.S. extradition policy. These four main questions, or

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[67] See George's discussion on heuristic case studies and building block approaches to the construction and development of theory. Ibid. p. 52.

themes, which are discussed at length in Chapter 8, are introduced and identified here as:

- What is the political relationship between extradition and terrorism?
- What are the key issues and problems surrounding the adoption and implementation of U.S. extradition treaties?
- What are appropriate alternative responses to international terrorism, where extradition is not a possibility?
- How valuable is extradition as a tool in combating terrorism?

These three levels, which endeavour to 'develop, discuss, and dissect', when braided together, argue for the strength of extradition as a useful and valuable tool in combating international terrorism.

1.4 Chapter Outline

This chapter introduces the topic and an overview of the discussion. It outlines the objectives of the work and the primary research questions that will be addressed throughout. Further, it provides a conceptual definition of terms, which are referred to throughout the study, as well as a brief introduction of the existing literature on this subject area.

Chapter Two will provide a theoretical framework that will allow an empirical discussion to be applied to a cross-disciplinary study. A description of traditional methods of thinking about international relations and its applicability to international law will be addressed. Following this, an examination of the limitations of these models will be discussed. Finally, the criteria for an integrated study that will provide

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[68] Refer to Chapter 1.4 Chapter Outline

the template for empirical analysis will be established. This will create the basis for the application of a new paradigm.

Chapter Three will act in tandem with Chapter Two, by completing the theoretical model and framework for analysis. It seeks to establish a template for extradition and terrorism, which will be applied and discussed using an integrated argument. This chapter seeks to expand the argument for a constructivist model of analysis that was introduced in Chapter 2, and to define much of the key terminology referred to throughout the work. It addresses the rules, law and norms debate in the context of a constructivist model as well as how the regime debate can be reconciled within this framework. Further, it establishes how this is applied to the study of extradition and terrorism, both historically and practically. The roles of international agreements are introduced here in terms of how they create a case for compliance. Finally, Chapter 3 will introduce and explain the criteria for case selection, around which the remainder of the work is centred. In sum, it seeks to accomplish the 'method and approach' requirement of the study.

Chapter Four examines the role of international co-operation towards punishing terrorism using the *Achille Lauro* case example. This is the most complex of all the case study examples because it encompasses so many different facets within the one incident. How states justify their decision making process is corollary to the level of international co-operation and compliance. This chapter focuses not only on these two factors, but also on how the web of events affected the prospects for co-operation and compliance and ultimately extradition in the context of a terrorism incident. Arguably, all case examples do this too much of the same extent. However, the *Achille Lauro* provides with much greater clarity, insight into how state's response is

measured against existing instruments which provide and promote international co-operation.

Chapter Five will discuss and examine through use of case example, domestic political circumstances which affect international terrorist extradition and compliance. Chapter Five, the TWA hijacking and extradition of Mohamed Hamadei, brings to light one of the classic problems in international relations, which is the influence of politics over decision making, and how compliance is affected by this. Specifically, the example is applied to allied states, where co-operation on diplomatic and political levels are normally conducive to one another.

Chapter Six examines the options available to states in dealing with incidents of international terrorism which are severely limited when it involves states who are sponsors of terrorism. It takes into account what alternative measures that become available as a potential response to terrorism other than the use of extradition, such as the use of military force, sanctions, and deportation. The highly charged topic of a potential International Criminal Court is also introduced and discussed.

Chapter Seven examines how the relationship between extradition and terrorism has evolved, if at all, through several recent case study examples; the World Trade Center bombing and the two separate extradition cases that resulted from it. The African embassy bombings and the recent extradition and trial of the accused suspects, and the Mir Aimal Kansi case, accused of the CIA shootings, rendered and returned to the U.S. for trial.

What this final example targets is neither the full details or the specifics of the cases, nor the specific laws or treaties that influenced the outcome, but rather, what lessons has history taught us from dealing with these types of incidents? How has it

affected or influenced the way extradition is dealt with in terms of compliance? In other words, what is different now? Moreover, how have we come to this point? The lessons of history invoked either by accident or by deliberate action, do say something about the way the global community has either; learned to come together to defuse the problem, or at least found a way of avoiding creating an international incident. By assessing these themes, the thesis identifies and demonstrates new trends in co-operation, or the process and in international law.

Chapter Eight concludes the study by distilling the major themes and issues raised throughout the study, and discusses the underlying issues which are prevalent throughout the study, but not overtly discussed. This is the summation argument for the work, which in its final assessment, will comment on the value of extradition as a tool for combating international terrorism.

1.5 Definition of Terms

No statesman or scholar to date has been able to effectively define terrorism into a concise or precise definition; this work will not be so brazen as to attempt to remedy that here. *Terrorism*, will adhere to Schmidt and Jongmann's definition as:

> *"Terrorism is an anxiety-inspiring method of repeat violent action, employed by (semi-) clandestine individual, group, or state actors, for idiosyncratic, criminal, or political reasons, whereby -- in contrast to assassination -- the direct targets of violence are not the main targets. The immediate human victims of violence are chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat - and violence based communication processes between terrorist (organisation), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought."*[69]

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[69] Alex P. Schmidt and Albert Jongmann, Political Terrorism: A new Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature 2nd Edition (Amsterdam: North-Holland, 1988) p.28.

While the term 'terrorism' does apply to both domestic and international violence, it will apply here specifically to international political terrorism.

Extradition will be adhered to in the same manner as defined by the *Public International Law Textbook.*

> *A criminal may seek refuge in a State which has no jurisdictional competence to try him, or is unwilling to try him, in respect of offences committed by him within the territory of another State. International law, therefore, allows the State in which a suspected or convicted criminal has sought refuge to extradite him by surrendering him to the State exercising jurisdictional competence to try him.* [70]

The very principle of *Aut Dedere Aut Judicare*, commonly used to refer to the obligation to extradite or prosecute, is the language contained in many of the international treaties aimed at securing international cooperation in an attempt to curb very specific types of criminal behaviour, is the context in which this definition is discussed. This is not designed to be a study in the legal analysis of extradition, and it is acknowledged of course that there exist many aspects of extradition law; however, this study does not examine to any great detail the many aspects of extradition.

The matter of rendition is discussed several times in the study, specifically in Chapter 7 and again in Chapter 8, as an alternative to extradition. For the purpose of discussion it will adhere to Cherif Bassiouni's definition as occurring when the official of the state of refuge "acts outside the framework of a formal process or without authority to facilitate the abduction or cause the surrender of the fugitive."[71]

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[70] Robert MacLean, ed, Public International Law Textbook, 16th Edition, (London: HLT), 1994, p. 116.

[71] Cherif M. Bassiouni, International Terrorism and Political Crimes, (Illinois: Charles C. Thomas Publisher, 1975), p. 352.

The matters of deportation and exclusion as discussed in Chapter 7, will adhere to the U.S. Immigration and Naturalization Agency definitions as:

- *Deportation* – the formal removal of an alien from the United States when the alien has been found removable for violating the immigration laws. Deportation is ordered by an immigration judge without any punishment being imposed or contemplated.[72]

- *Exclusion* – the formal term for denial of an alien's entry into the United States. The decision to exclude is made by an immigration judge after an exclusion hearing. [73]

Although these are U.S.-centric definitions, the same definitional concept would apply to just about any other state. Deportation from the U.S., the U.K., or China, is still deportation. The difference, ostensibly, would be the procedure by which deportation would take place, for example before an immigration judge, the time of allowable detention, rights of asylum, etc. However, these are matters of immigration, and not wholly applicable to the discussion. The aspect of interest here is how rendition, deportation, exclusion, may be employed as viable alternatives to extradition, and how they are potentially used in cases involving fugitive terrorists.

1.6 Method and Approach

This study is an empirical investigation of the usefulness of extradition as a tool against international terrorism, from the perspective of the U.S. experience. A variety

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[72] For definitions see INS web site at: http://www.ins.usdog.gov/graphics/glossary.htm

[73] Ibid. Note: This definition was prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. After April 1, 1997, the process of adjudicating inadmissibility may take place in either an expedited

of research strategies ranging from historical and comparative analysis, and based on a case study approach, are used to examine, the role of extradition as a tool in combating terrorism and how that role has evolved over the past two decades.

Much of this study is historical in character, and justifiably so. As observed by Dougherty and Pfaltzgraff, "history is the great laboratory within which international action occurs".[74] Although many other works have been written using the same historical case studies surveyed in this work, the use of the historical experience is still appropriate. Previous examinations of these case studies focus on either the legal extradition aspect or the political terrorist aspect of the issue, but not both. The subject matter has not been exposed to a cross-disciplinary examination with the specific goal of evaluating extradition as a meaningful tool in combating terrorism. One of the major aims of the study is to provide an evolution of terrorist extradition, from the U.S. perspective as it has evolved from a decade and a half ago to the present, with the goal of examining the political relationship between extradition and terrorism. This includes how capturing terrorists has changed from the early 1980's when the problem came to the forefront of U.S. policy, to present day, and signalling how the law of extradition is used and how this use has changed. The value added by historical analysis supports this evaluation of the changing use of extradition for assessing its value as a tool for combating terrorism.[75]

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removal process or in removal proceedings before an immigration judge. The process has been changed, but the definitional concept has not.

[74] Dougherty and Pfaltzgraff acknowledge Morton Kaplan's praise of history as: "There is one respect in which a science of international politics must always be indebted to history..." See: James E. Dougherty and Robert L. Pfaltzgraff, Contending Theories of International Relations: A Comprehensive Survey, 3rd Edition, (New York: Harper Collins, 1990), p. 15.

[75] Alexander George offers a greater discussion on the importance of history in the case study approach, noting that "even if people agree on the correct lessons to be drawn from a particular historical case, they often misapply

The use of a case study approach was employed for the following reasons; first, the subject matter naturally lends itself to this type of analysis since the selection of cases is a relatively obvious method of dealing with the subject matter. Second, using a case study method allows the work to examine the context of the political relationship between extradition and terrorism, as case studies tend to be context specific. This is important aspect of case study analysis since the context of state response is often as context specific as the threat in which it counters. Finally, a case study approach is a practical and efficient structure and demonstrates the evolution of how extradition cases involving fugitive terrorists has developed and changed over time.

Numerous theoretical approaches appeared, upon initial examination, to provide a suitable backdrop relevant to this type of cross-disciplinary case study analysis and subject matter, however, no one single theoretical approach conforms exactly. The challenge was to provide an integrated theory, one which would provide for a historical case study analysis to serve as a point of departure. As discussed in great detail in Chapters Two and Three, traditional methods of international relations thinking are limited in their scope on a practical level insofar as their applicability toward the study of extradition and terrorism. Since two full chapters are dedicated to the development of this model, and the reasons for employing this approach, there will not be a great deal of detail or discussion now; except to say that this study will employ the use of an approach grounded in tenants of a rational choice model. The theoretical base used as a cornerstone for study utilises a constructivist argument,

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those lessons to a new situation that differs from the past one in important respects", See: Alexander L. George: CASE STUDIES

which will provide a common ground for both the use of international law and international relations; and at the same time allow for the analysis of the domestic decision making of states. This not only provides a point of departure for case study analysis, but also offers a practical lens to examine the political relationship between extradition and terrorism, and its effectiveness as a tool of international law.

1.7 Literature Review

There is an exhaustive amount of literature, which focus on the topics of international law, international relations, and the marriage between disciplines, extradition law, extradition case studies involving terrorism, and terrorism as a stand-alone topic. However, no one work combines all these elements and observes them from the U.S. experience, with an emphasis on examining the political relationship between extradition and terrorism. In fact, to date, no academic, legal, or policy expert has published a study on the political influence of extradition in cases dealing with international terrorists. Consequently, this void in material has influenced not only the impetus for study, but the methodological approach used in this study as well.

Much of the available literature on extradition speaks from a purely procedural aspect. Geoff Gilbert's Aspects of Extradition Law[76] for example, examines the main themes of international extradition law from a procedural aspect, in order to reveal conflicts between different legal systems, and examine the potential for remedy of those procedures. Bassiouni and Wise's Aut Dedere Aut Judicare The Duty to

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[76] Gilbert, Aspects of Extradition Law, (Dordrecht: Martinus-Nijhoff Publishers), 1991.

Extradite or Prosecute in International Law,[77] is virtually self-explanatory in discussion of its content, addressing obligation in terms of treaty agreement and rule of law. John Bassett Moore's A Treatise on Extradition and Interstate Rendition[78] does much of the same by discussing basic procedural aspects of extradition as does Samuel Spear's Law of Extradition: International and Inter-State.[79] In terms of a history and general understanding of extradition, I. Shearer's Extradition in International Law,[80] spends considerable time on this subject area compared to other works. None of these works, however, spend any considerable amount of time on the topic of terrorism, or terrorist extradition. Perhaps the most useful work, which dealt with the subject matter of extradition as well as that of terrorism, was John Murphy's Punishing International Criminals,[81] and Murphy's other work Legal Aspects of International Terrorism,[82] which provide some of the most useful insight and analysis regarding the topic of terrorist extradition. In addition, Alona Evans and John Murphy's collaborative work Legal Aspects of International Terrorism,[83] despite its date of publication, 1978, nevertheless offers some of the most exceptional discussion of the issues surrounding terrorism and the law.

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[77] M. Cherif Bassiouni and Edward M. Wise, Aut Dedere Aut Judicare – The Duty to Extradite or Prosecute in International Law, (Dordrecht: Martinus-Nijhoff, 1995).

[78] John Bassett Moore, A Treatise on Extradition and Interstate Rendition, (Fred B. Rothman & Co., 1997)

[79] Samuel Spear, Law of Extradition: International and Inter-State, (Fred B. Rothman & Co., 1983)

[80] Ian Shearer, Extradition in International Law, (Manchester University Press, 1971).

[81] John Murphy, Punishing International Criminals, (Rowman & Allanheld, 1986).

[82] John Murphy, ed. Legal Aspects of International Terrorism, (Villanova, 1984).

[83] Alona E. Evans and John Murphy eds, Legal Aspects of International Terrorism, (Lexington, MA, Lexington Books, 1978).

It appears impossible to discuss this subject matter without involving the works of Cherif M. Bassiouni, who appears cited in every single work on the subject matter. His most relevant applicable work, besides the aforementioned Aut Dedere Aut Judicare, and numerous law review works, International Terrorism and Political Crimes,[84] is both useful and applicable as a reference of primary literature.

The inescapable scholarship applicable to the terrorism aspect of this study, or any study on terrorism: Paul Wilkinson's Terrorism and the Liberal State;[85] Grant Wardlaw's Political Terrorism Theory, Tactics, and Counter-Measures;[86] Charles Kegley, International Terrorism Characteristics, Causes, Controls;[87] and Walter Laquer's The Age of Terrorism[88] are the cornerstones of any student of terrorism. One of the interesting more recent works, which deals with U.S. counter-terrorism efforts and policy initiatives, which was highly influential, is Philip Heymann's Terrorism and America, A Commonsense Strategy for a Democratic Society.[89] Heymann's work is not a study of terrorism on balance, but of the U.S. experience with terrorism, and includes many of the case studies included in this survey. While there is no allusion to extradition, Heymann does examine from the U.S. perspective, many of the topic areas that are addressed in this work as well, such as the importance

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[84] Cherif M. Bassiouni, International Terrorism and Political Crimes, (Springfield, Illinois: Charles C. Thomas, 1975).

[85] Paul Wilkinson, Terrorism and the Liberal State, (London: McMillian, 1977, revised edition, 1986).

[86] Grant Wardlaw, Political Terrorism Theory, Tactics, and Counter-Measures, (Cambridge University Press, 1989).

[87] Charles W. Kegley Jr., International Terrorism Characteristics, Causes, Controls, (St. Martins Press, 1990).

[88] Walter Laqueur, The Age of Terrorism, (London: Little Brown, 1987).

[89] Phillip B. Heymann, Terrorism and America, A Commonsense Strategy For A Democratic Society, (Cambridge, Massachusetts: The MIT Press, 1998).

of international cooperation, state-sponsored terrorism and retaliation, and the use of the criminal justice system. However, the work is also largely geared towards the use of intelligence and U.S. foreign policy as counter-terrorism strategy, and does not wholly look toward the use of the law as a specific tool.

The scholarship that has influenced much of the theoretical discussion centres on is that of Friedrich V. Kratochwil's Rules, Norms, and Decisions.[90] Kratochwil examines the reasoning process in which norms play a central and decisive role in guiding decisions; and bases his argument on the classical thinkers of international law, thus making it an excellent work for the creation of an analytical model for a cross-disciplinary study of both international relations and international law.

Companion works that helped develop this framework of thinking, such as Anthony Arend's International Rules,[91] which provides an excellent discussion of the most prominent approaches to international relations and international law using legal rules. Focusing on rules specifically, it addresses the fundamental nature of their role, origin and purpose in politics, providing a solid foundation for interdisciplinary study and further research. This is also prominent in Arend's latest work, Legal Rules and International Society.[92] However, Arend's works follow a 'law as a body of rules' argument, which, as discussed further in Chapter 3, does not fit the requirement of the study to employ law to choose between norms in a given context. This requires a 'law as a process' argument. The more useful guide toward developing this strategy was

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[90] Friedrich V. Kratochwil, Rules, Norms, and Decisions – On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs, (Cambridge University Press, 1989).

[91] Robert J. Beck, Anthony Clark Arend, Robert D. Vander Lugt, International Rules Approaches from International Law and International Relations, (Oxford University Press, 1996).

[92] Anthony Clark Arend, Legal Rules and International Society, (Oxford University Press, 1999).

Roslyn Higgins Problem and Process,[93] where the key issues in the rules-process debate in international law are introduced and discussed at length. Higgins sheds light on the rules-process debate; and while not completely contradicting her contemporaries such as Arend and Beck; she places greater emphasis on the 'law as a process' argument rather than the 'law as a body of rules' explanation.

There were additional works which were influential in formulating a framework of thinking, but as individual works did not discuss the topic as a whole, rather offered ancillary pieces of what became the methodological approach used here. Louis Henkin's How Nations Behave[94] is one such work which examines a similar benefit of using empirical evidence and its reflections on international law's impact on international relations. However, while it is a case approach encompassing law and foreign policy, it is not exclusive to the study of either extradition or terrorism.

An additional work that brought a rounding-out of the legal/political framework for analysis was Abram Chayes and Antonia Chayes, New Sovereignty;[95] an extremely important work differentiating models for analysis as they apply to the use of treaty norms. The Chayes discuss the use of the enforcement – vs. – managerial models of treaty compliance, the levels of compliance, the role of the state actor and it's standing in the international system, and the evolution of norms and regimes through the use of dialogue. Chayes uses empirical discussion to elaborate on treaty agreements and the effects of enforcement or sanctions on compliance. The use of the

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[93] Rosalyn Higgins, Problems & Process – International Law and How We Use It, (Oxford University Press, 1995).

[94] Louis Henkin, How Nations Behave – Law and Foreign Policy, Second Edition, (Council On Foreign Relations, 1979).

[95] Abram Chayes and Antonia Handler Chayes, The New Sovereignty Compliance with International Regulatory Agreements, (London: Harvard University Press, 1995).

Chayes work is expanded upon more extensively in Chapter 3, in the discussion of compliance.

Two final influential works were Thomas Franck's Power of Legitimacy Amongst Nations[96] and Fairness in International Law and Institutions;[97] which were both instrumental in completing the basis of thought for creating the framework. Both of Franck's works speak to the changing nature of international society, the renewed emphasis on the emergence of rules and the perception of their legitimacy that encourage compliance. However, neither of these works speaks to extradition, or terrorism, and were useful only insofar as influencing the understanding of legal, historical, political, and philosophical threads of legal rules in an international society.

International legal scholarship is plentiful. Many basic texts in this discipline were surveyed in order to gain an understanding and appreciation of the legal thought process and where commonality existed as a point of departure for an interdisciplinary discussion. Oppenheim's International Law,[98] and J.L. Brierly's Outlook for International Law[99] are both key basic texts which discuss the nature of law and its interaction with the structure of international society. Despite their time of publication – the subject matter remains valid. More current works, such as Shaw's International Law,[100] Akehurst's Modern Introduction to International Law,[101] and

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[96] Thomas M. Franck, The Power of Legitimacy Among Nations, (Oxford University Press, 1990).

[97] Thomas M. Franck, Fairness in International Law and Institutions, (Oxford: The Clarendon Press, 1995).

[98] Lasa Oppenheim, International Law, (London: Longmans, Green, & Co., 1920).

[99] J.L. Brierly, Outlook for International Law, (Oxford: The Clarendon Press, 1944).

[100] Malcom N. Shaw, International Law, (Cambridge University Press, 1994).

[101] Peter Malanczuk, Akehurst's Modern Introduction to International Law, Seventh Revised Edition, (Routledge, 1997).

MacLean's International Law Textbook,[102] all provide additional discussion on the topic of international law with significantly greater clarity, considerably more detail and with a wider range of references than earlier works. The greater readability of later works also includes discussion of legal applicability to current modern crises. The Shaw book for example, refers to the crisis in Kuwait, and provides modern reference examples of the applicability of international law and its principles. This is decidedly more helpful in gaining a basic philosophy of understanding about the workings of international law.

Aside from the major texts, which allow for a depth of understanding of the subject matter in detail, much of the supplementary work is derived from journals involving discussion of theory, cross-disciplinary prospects for analysis, in-depth case study analysis, and subject-specific debate. In particular, *International Organizations* special edition on "International Regimes" was extraordinarily helpful, as was the *Harvard Research in International Law.*[103] These are but two examples of specialized publications shorter than the basic text but voluminous in terms of wealth of information. Literally, dozens upon dozens of journal articles have been written regarding the specifics of extradition; extradition and terrorism; case studies in terrorist extradition; etc. These proved very helpful in developing the case arguments as well as providing a background for research and endless source material. Academic journals that pertain to the specifics of theoretical debate were plentiful as well. It was not difficult to find an author with an opinion on the subject matter, the

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[102] Robert MacLean, Public International Law Textbook, 16th Edition, (HLT Publications, 1994).

[103] *Harvard Research in International Law Project*, 29 American Journal of International Law 15, 21 Supp. 1935.

challenge was in creating a framework for analysis that could discuss these opinions within a wider context.

Periodical and newspaper articles form a large body of material specifically as they relate to individual case studies and related issues. Terrorist attacks, especially some of the more dramatic attacks against U.S. citizens or establishments, such as Lockerbie, the *Achille Lauro*, or TWA 847, garner a considerable amount of media attention. Newspaper accounts, while varying drastically in quality and reliability, do offer a reconstruction of the context of the event, and the political atmosphere surrounding the case. Media accounts of the events are almost identical in terms of their ability to account for the factual details of the events. However, their ability to read into the political aspects of the events, or the legal proceedings following the events, are inconsistent, weak, and at times, depending on the publication, factually incorrect. While periodical articles offer slightly more accurate political analysis, Western media, most notably U.S. media, still cannot escape the sensationalism spurred by a terrorism event.

The use of the Internet, a relatively new angle of research, was useful for locating treaties and international agreements, providing a virtual wealth of legal library research which in years past would have required a substantially greater amount of time to acquire. The Internet is not, however, an accurate source of analysis, or politically related material. Much of what is found by way of analysis toward specific instances, or cases, are extremely biased, inconsistent, and often factually incorrect. Alternatively, there is much historical data to be located on many of the news sites, which offer chronologies, or access to earlier news stories.

The greatest contribution, however, to the work in terms of data collection, was derived from personal interviews, personal involvement, and off the record "Chatham House Rules" conversation. Through my employment opportunity at The Scowcroft Group, I had the benefit not only of access to the Former U.S. National Security Advisor to two U.S. Presidents, General Brent Scowcroft, but many of the former members of the U.S. National Security Council, former Senior Level U.S. Department of State personnel, former Senior U.S. Military, and former White House staff. This offered formidable data not only in terms of institutional knowledge of the empirical events themselves, but challenged my thinking toward U.S. foreign policy, international law, and the international community on balance, in a way that text and journals never could.

To my added benefit as well, other avenues of employment opportunity brought me to the U.S. Department of State, Bureau of Diplomatic Security, where I was afforded the opportunity to consult senior U.S. policy advisors as well as several law enforcement officials from a variety of agencies. This proved invaluable in terms of information, understanding, and in formulating many of the arguments within the case studies. Many of my law enforcement contacts and interviews were law enforcement Agents whom had worked with terrorism task-forces and had first hand knowledge of investigations; or had been a part of those investigations, which were directly pertinent to this study.

I am certain not every doctoral candidate has the privilege of access to these sources. It is recognized that these opportunities were in fact a privilege, and that much of the information which was afforded to me, especially from the law enforcement angle, is restricted. I have been made keenly aware that much of the

information that was attained by me while holding a clearance in a law enforcement-sensitive environment, and those materials labelled as 'classified', cannot be used in any way in this work, and they are not used *at all*. Nevertheless, the conceptual knowledge derived from it, as well as the discussions which followed, have proven to be invaluable to this study on several levels. First, it has filled in the cracks, and enabled a greater, more comprehensive understanding of the topic, allowing for a more solid foundation on which the subject is examined. Second, the information gleaned has provided for a greater sophistication about the topic, more than any other source could provide. Finally, and perhaps most important, they have removed the veil of appearance created by mainstream media accounts, and 'cleansed' source material. Thus, these interviews have provided for a much more genuine understanding of the role and effectiveness of extradition, the key issues and problems which hinder it, the alternatives to it, and most significantly, the factors which influence it.

Chapter Two

International Law and International Relations: A Theoretical Framework for a Cross-Disciplinary Study

> *'I find that the distinction between political scientist and lawyers is another mental construct that may or may not have significance in the world of ideas; you have really to decide whether the distinctions we are drawing have so many exceptions and lack of generalities that they are simply part of our habitual struggle for the intellectual dominance of a certain discipline that purports to be a complete explanation. What I come down to is fairly simple for those familiar with 'WordPerfect'. As regards lawyers, things happen in the legal order that are not wholly comprehensible with any system that I have seen lawyers develop; as regards political scientists, things happen that rational actors would not do if any single political science theory really possessed the dominance it asserts. What you have in the real world is something that cries out for somebody to press 'Reveal Codes."*[1]

The purpose of this chapter is to provide a theoretical framework which will allow for empirical evidence to be applied to the principles of law and international relations. Whereas previous attempts have been made to reconcile the two disciplines, which follow a tendency to polarise rather than unite. This framework is an endeavour to integrate both disciplines, a bi-focal lens, under which specifically the extradition process to cases of international terrorism will be examined. The contents of this chapter are best explained as following the primary rule of evidence in legal thought: 'in order to effectively argue your case, you must first introduce to dismiss the evidence which is most harmful to your argument'. Adopting this logic, makes it possible to dispel the previous cross-disciplinary arguments which fail to accurately provide for effective interdisciplinary collaboration toward extradition and terrorism.

Previous theories of international relations which provide a suitable backdrop for collaboration are addressed briefly in this chapter, and work toward a single theory

compatible with the legal and domestic issues which invariably arise as part of this study. The application of international law as a primary factor toward a mutual understanding is not the focus. While the aim is to inter-relate the two, the thesis is predicated on international relations concepts which share the common playing field of international law, and therefore must be argued from that vantage point. It is intentional that certain long-standing and respected theories are expelled for the purpose of this argument. However, it is not the intention of the work to assume that all previous theories of law and international relations are profitless toward a cross-disciplinary understanding. The specifics of the study are more complex requiring a postulate with greater breadth and manoeuvrability. One which will concentrate and account for deeper issues which are prevalent to the examination of extradition and international terrorism, such as, the analysis of state's internal decision making processes, or the degree to which international law is internalised by the state. Secondly, the state's decision to comply, or not, to international law, or a measure of the degree of compliance. These two 'sub-issues' create the inherent problem in the success and enforcement of extradition. The use of an integrated theory, one which will provide for analysis on a domestic as well as international level, serves as a point of departure for which empirical evidence can be applied.

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[1] Remarks made by Alfred P. Rubin, Professor of International Law, The Fletcher School of Law and Diplomacy, at the American Society of International Law Proceedings 86th Annual Meeting, April 1-4, 1992. Hereinafter: ASIL PROCEEDINGS.

2.1 Introduction

> *'The end of the Cold War has removed obstacles to making new law and has mooted old controversies as to existing law....[f]or the first time we can, it is hoped, address festering problems such as international terrorism.'*[2]

The principles of extradition as phrased by the term *aut dedre aut judicare*, to extradite, or submit to judicial authority for trial, creates the problem for states in that its implied obligation aims at securing a form of international co-operation. Rooted in the Grotian idea of 'goodwill', it implies a societal agreement of common values, of shared interests, of mutual goals.[3] It is a voluntary legal agreement, a contract, binding upon consent by member states. Extradition assumes the contracting parties share a common desire to fulfil the terms of the contract. Legally, this makes perfect sense. Politically, is considerably more complicated. In order to accept the argument, one must first accept that a state's interest is definable; that this interest is generated for the betterment of an international society and not the anarchical self interest professed by conventional wisdom; that states have a general interest in upholding international law in all cases, not just those that suit their own needs; that society will enforce the parameters of international law, and that they have a general interest in doing so. As history has proven, this is not the case. And in no place is it better exemplified than by the application of extradition to cases involving wanted terrorists.

The obligation to extradite is a theoretical one. Scores of legal materials have been produced to define the legal notion of obligation, and in the strictest sense,

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[2] Louis Henkin, International Law: From The Old World Order To The New, Ibid.

[3] '[S]o by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the law thus originating had in view the advantage, not of particular states, but of the great society of states.' Hugo Grotious *Prolegomena* No. 17, De Jure Belli Ac Pacis, reprinted in Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt eds., International Rules, Approaches from International Law and International Relations (Oxford: Oxford University Press), 1996, p. 42.

extradition is a legal problem. It is the execution of extradition, the decision for states to co-operate and comply to an unenforceable, voluntary legal agreement, which forces the issue into the arena of international relations. Several theoretical attempts have been made to explain co-operation in international relations, all of them limited in scope. It is necessary to bear in mind that theory is only an attempt to explain action. For every action, there is explicable theory. For every argument, there is an appropriate 'framework for analysis'. This work does not purport to be any exception. This work does seek to depart from the conventional realist assumptions of international relations theory which posit strict limits to the prospects of co-operation with international law.

Conventional realist theorists, such as Carr, Morgenthau, and Kennan limit their cross-disciplinary focus of law and international relations by placing law in opposition to power.[4] Leading neo-realists, such as Kenneth Waltz, sought a structural model, anarchic in nature, devoid of the constraints of law altogether.[5] Other thinkers emphasized the role of the type of government and leadership of states in shaping the international politics, and largely ignoring the role of international law. Others rely on Institutionalism or Liberalism as possible paradigms, but traditional postulates cannot wholly account for international behaviour and domestic decision making, jointly; nor does each give an accurate account of the politics of the international system. These are necessary conditions if the appropriate theoretical framework is to be applied to

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[4] 'The Realist paradigm establishes a polarity between law and power, opposing one to the other as the respective emblems of the domestic versus the international realm, normative aspiration versus positive description, co-operation versus conflict, soft versus hard, idealist versus realist.' See: Anne-Marie Burley, *Law and the Liberal Paradigm in International Relations Theory*, ASIL PROCEEDINGS.

[5] This alludes to Kenneth Waltz's answer to Realism, known as 'structural realism' or 'neo-realism'. Neo-realism will not be addressed since it makes no attempt to be compatible with international law. For discussions on Neo-realism see: Kenneth N. Waltz, Theory of International Politics, (Reading: Addison-Wesley, 1979).

the study of extradition and terrorism. Extradition is not a self executing principle, it requires decision making on behalf of one or more contracted parties. Terrorism is a mode of violence or phenomena to the international system. Both are concepts which imply combined legal/political system, a system that seeks to beget an overall social order. A theoretical foundation which fundamentally lacks the basics for co-operation between law and politics clearly poses an obstacle to this system. There is a need then, for an alternative paradigm which will account for the role of behavioural norms, and highlight the dichotomy between domestic decision making and international order.

The first part of this chapter will describe the traditional methods of thinking about international relations, and their applicability to international law.

The second part will examine the limitations of these models on the theoretical level and on a practical level insofar as their applicability toward the study of extradition and terrorism.

The third part works toward the criteria for an integrated study. One which will provide a suitable template for the empirical case study application of extradition and international terrorism.

2.2 The Realist Paradigm - Revisited

The post W.W.II emergence of Political Realism was a by-product of the time period. The founders of political realism based it's premise on their war-time observations and the failings of Woodrow Wilson's internationalism.[6] Relations

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[6] Woodrow Wilson's 'Fourteen Points' advocated the international system should not be based on balance of power, but ethnic self determination. Security should not depend on military alliance but collective security.

between states is based on a power model[7], a Hobbesean tradition of 'war against all'.[8] A 'realistic' representation of international politics claims to view the world as it is and not as it 'ought' to be. Realism purports a state centred model in which the state becomes a rational unitary actor. Anarchy, the struggle for power and self interest in an unchanging international system, shape and define the political norm.[9] There is no harmony of interests between states. There is no altering behavioural norms. Mankind is intrinsically evil, power-seeking, requiring safeguard mechanisms such as a balance of power[10] to regulate behaviour. Realism does not subscribe to a moral or philosophical order, nor does the realist believe that either one holds a place in their application to politics. 'Lessons of history', and political practice define a foreign policy based on strength, influence, and coercive diplomacy, and clearly delineated from domestic politics.

Power politics,[11] within this model serves diametrically opposed to the idea of law.[12] Arguably realist concepts and the recognition of power politics, provided the

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Diplomacy not conducted secretly but on the basis of open arrangements. See: Henry Kissinger, Diplomacy, (New York: Simon & Schuster, 1994), p.19.

[7] 'Politics is a struggle for power over men, and whatever its ultimate aim may be, power is its immediate goal and the modes of acquiring, maintaining, and demonstrating it determine the techniques of political action'; Hans Morganthau, Scientific Man Versus Power Politics, (Chicago: University of Chicago Press, 1946), p.43

[8] Thomas Hobbes, Leviathan, (Oxford: Oxford University Press, 1996).

[9] 'The utopian, who believes that democracy is not based on force, refuses to look these unwelcome facts in the face.' See: E.H. Carr, *The Nature of Politics* , The Twenty Years' Crisis, (London: MacMillian, 1981). Reprinted in: Paul R. Viotti and Mark V. Kauppi eds., International Relations Theory, Realism, Pluralism, Globalism, (New York: MacMillian, 1993), p.563.

[10] See: Kissinger, DIPLOMACY, pp. 17-21.

[11] Morgenthau makes the distinction between 'power' and 'political power': 'When we speak of power, we mean man's control over the minds and actions of other men. By political power we refer to the mutual relations of control among the holders of public authority and between the latter and the people at large.' Hans J. Morganthau, Politics Among Nations, The Struggle for Power and Peace, Brief Edition, (London: McGraw-Hill, 1993), p. 30.

[12] See: George F. Kennan, American Diplomacy, (University of Chicago Press, 1985), p.99. 'This legalistic approach to international relations is faulty in its assumptions concerning the possibility of sanctions against

very groundwork for lawmaking institutions such as the United Nations, law has no real function here except for that provided by a 'moralistic' approach. This is in total contrast to the influential Kantian ideal that security rests within a united body bound by a common interest, a 'peace through law',[13] utopian image suggesting a universal value system based on common morality. This holds no relevance to the decentralised,[14] unenforceable[15] nature of international law. The international lawyer, then, is left to establish some form of relevance within international law.[16]

2.2.1 Legal Response to Realism - Prospects for a Cross-Discipline

Post-war foreign policy by and large ignored legal scholarship. Efforts to respond to the realist debate ultimately reshaped the function of international law by reformulating law's primary purpose. By reconceptualizing the role of international law, legal thinking sought to provide a new relationship between law and politics. This shift of emphasis from the rule of law, to the process by which it ought to provide a more active policy role, was the engine behind the challengers to Realist thinking.

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offences and violations. In general, it looks to collective action to provide such sanction against the bad behaviour of states. In doing so, it forgets the limitations on the effectiveness of military coalition.'

[13] See: Grenville Clark and Louis Sohn, World Peace Through World Law, (Cambridge: Harvard University Press, 1966).

[14] 'The decentralized nature of international law is the inevitable result of the decentralized structure of international society' See: Morganthau, POLITICS, p. 255. See also: J.L. Brierly, The Outlook for International Law, (Oxford: The Clarendon Press, 1944).

[15] Morganthau address the issue of enforceability in international law as: 'According to this principle , the victim, and nobody but the victim of a violation of the law has the *right* to enforce the law against the violator. Nobody at all has the *obligation* to enforce it. There can be no more primitive and no weaker system of law enforcement than this; for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation. It makes it easy for the strong both to violate the law and to enforce it, and consequently puts the rights of the weak in jeopardy.' Ibid. at 266.

The first such response was that of the McDougal-Lasswell, or 'New Haven School' approach.[17] This framework, defines law by empirical observation and social reality.[18] The elimination of the distinction between law and politics through this approach reconfigures law as a political process. The political process defined analytically by value analysis,[19] although recognising that no common value system exists in an international system. This is law as an expressive realisation of values rather than legal restraint of behaviour.[20] This methodology develops a prescriptive framework based on the legitimacy of international law and it's effect on legal rules.

Subsequent legal scholarship uses the fundamental concepts of this framework. Emphasis on the necessity of legal expression in a political and social value system remains constant. Although the rejection of a common value system changes on this second tier of legal response to realist thinking.[21] This shift towards a more idealist

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[16] See: Karl W. Deutsch and Stanley Hoffmann eds., The Relevance of International Law, 1968 *Festschrift* in honour of the 65th birthday of Leo Gross, professor of international law, Fletcher School of Law and Diplomacy.

[17] Myers S. McDougal, the former president of the American Society of International Law and Yale Professor of Law. Harold D. Lasswell, also a Yale Professor of Law and Political Science, and former president of the American Political Science Association. The two corroborated on what was viewed as the first truly interdisciplinary approach, alias - the McDougal-Lasswell approach, or 'New Haven School' of thought. See: Harold D. Lasswell and Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale Law Journal 203, 1943

[18] Social reality here, is referred to as a 'World Social Process', as defined by McDougal-Lasswell as: "participants in the world social process are acting individually in their own behalf and in concert with others with whom they share symbols of common identity and ways of life of varying degrees of elaboration. ...the fundamental goal stays ever the same, the maximization of values within the limits of capability." See: Myres S. McDougal and Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order* , reprinted in Robert J. Beck, Anthony Clark Arend and Robert D. Vander Lugt, International Rules Approaches from International Law and International Relations, (Oxford: Oxford University Press, 1996), p.118.

[19] For further references on 'value analysis' and the New Haven approach, see: Anne-Marie Slaughter Burley, *International Law and International Relations: A Dual Agenda* , 87 The American Journal of International Law 205, 1993, at note 17.

[20] The New Haven Approach works toward a 'Universal Order of Human Dignity' which is understood as: "refers to a social process in which values are widely and not narrowly shared, and in which private choice, rather than coercion, is emphasized as the predominant modality of power." See: Myres S. McDougal and Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, reprinted in Robert J. Beck, Anthony Clark Arend and Robert D. Vander Lugt, INTERNATIONAL RULES, p.123

thought process stemmed from reason that the post-war world was also a nuclear world. The idea of no common system of values seemed implausible. International law could not be perceived as a process based only on societal need, but on global ideology as well. International law, then serves as a model providing for the interests of a world community, as opposed to serving just the actors within the system.[22] The change is reflective of a more 'systemic' model.[23]

The final recasting of international law is a 'causal' model on a more practical level. The emphasis is still 'law as a process', but the shift is from a 'political' to 'legal' process, or stated another way, it is the measure of influence the international legal process, law, and lawyers have on international affairs.[24] This version is dependent on empirical evidence rather than the rehashing of scholarly thought, relying on pragmatic examination of legal norms which help formulate the decision making process. Specifically, the function, nature, and influence of law, it's limitations, and expectations of how nations behave.[25]

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[21] For discussion of this scholarship in full see: Richard A. Falk, The Status of Law in International Society, (Princeton University Press, 1970).

[22] See: Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in Earl W. Deutsch and Stanley Hoffmann eds., The Relevance of International Law, (Irvington Publishers, 1968).

[23] For a discussion on systems theory see: *Systemic Theories of Politics and International Relations, Definition, Nature, and Approaches to Systems Theory* , in James E. Dougherty and Robert L. Pfaltzgraff, Jr., Contending Theories of International Relations, A Comprehensive Survey, Third Edition, (New York: Harper Collins, 1990), pp. 136-175; John J. Weltman, Systems Theory in International Relations, A Study in Metaphoric Hypertrophy, (Massachusetts: Lexington Books, 1973). For a discussion of systems theory and it's applicability to norms see: Falk, STATUS, at note 21. For an opposing view see: Rosalyn Higgins, *Integration of Authority and Control: Trends in Literature of International Law and International Relations* in W. Michael Reisman and Burns H. Weston eds., Toward World Order and Human Dignity, Essays in Honor of Myers S. McDougal, (Foundation Press,1976).

[24] See: Abraham Chayes, Thomas Ehrlich and Andreas Lowenfeld, International Legal Process: Materials For and Introductory Course, (Aspen Law & Business,1968).

2.3 Regimes

One of the greater challengers to post-war Realist thinking emphasised the importance of formal institutions through reconceptionalizing international organisations, which played a significant role in the post-war period. Realist arguments had juxtaposed these institutions as a part of U.S. dominance, which was on a perceived decline during the 1970's.[26] The challenge to political science theorists was the need to explain the continued dominance of both institutions, and U.S. hegemony. This became the trajectory for Regime theorists whose focus lies within the ability for state actors to provide collective action and shape expectations through agreed 'principles, norms, rules, and decision making procedures'.[27] Regimes thus become the set of rules inclusive of social practices. Regime theorists provide a 'rationalist' model, arguing the value of institutions as serving a functional purpose in international relations through the participation of states. It posits that institutions create the condition for increased co-operation and negotiation between states by facilitating links between agreed norms.[28] Increased co-operation in turn increases the possibility for compliance, for legitimising standards of behaviour, and enforcement

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[25] Louis Henkin discusses this at great length. See: Louis Henkin, How Nations Behave: Law and Foreign Policy, (New York: Columbia University Press, 1979).

[26] '[T]he early 1970's, many theorists, reflecting current concerns, overreacted to the traditional theories of Realism. There was widespread repugnance to the Vietnam War, and détente seemed to reduce the importance of the nuclear competition. At the same time, international trade grew more rapidly than world product. Transnational corporations not only developed patterns of international production, but in some instances played dramatic political roles as well. All this occurred against a backdrop of declining U.S. economic predominance...futurologists such as Herman Kahn predicted the imminent arrival of a multipolar international system. On top of all this came the oil crisis of 1973.' Joseph S. Nye, *Neorealism and Neoliberalism*, World Politics, p. 236. See also: Herman Kahn and B. Bruce-Briggs, Things to Come, (New York: Macmillian, 1972).

[27] See: Stephen Krasner, International Regimes, (Ithaca: Cornell University Press),1983. See also: Stephan Haggard and Beth Simmons, *Theories of International Regimes*, International Organization , vol. 49, no. 491, 1987; Oran Young, *International Regimes: Toward a New Theory of Institutions*, World Politics, vol. 39, no. 104, 1986.

in a decentralised system.[29] What regime analysis seeks to accomplish, is the reconciliation between realist and idealist traditions.

2.3.1 Legal Response

The Cold War view of institutions was a 'peace through law' analogy. Regime response to this idea is flatly rejected on the grounds that governments are not subordinate to institutions, rather, it is institutions which empower governments.[30] The regime approach re-invents international law by allowing for an overlap of thinking between political scientists and international lawyers, through the emphasis of agreed rules which shape the political process. Regime thinking represents a shift in emphasis from law and politics in opposition, to law and politics becoming nearly indistinguishable, thereby bringing the two disciplines closer together. This is accomplished by allowing for proponents of international law, to become a part of the domestic political process of states. Creating a 'web' of interconnecting bureaucracy, information sharing, and communication, facilitates greater potential for compliance to international law through a fostering of common standards.

2.4 Institutionalism - A Second Approach

The re-birth of political theory as a rational choice model laid the foundation for additional approaches of political integration, and sharply contrasting the traditional

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[28] See: Robert Keohane, After Hegemony: Co-operation and Discord in the World Political Economy, (Princeton: Princeton University Press), 1984, p.10

[29] Ibid. p. 244-245

[30] Ibid. p. 244

realist-idealist debate. Institutions[31] are defined here as 'a general pattern or categorisation of activity or to a particular human-constructed arrangement, formally or informally organised'.[32] The theoretical belief subscribed to by Institutionalists, logically enough, is that world politics at any given time is largely institutionalised.[33] Taken as such, Institutionalism represents more of a framework for analysis than analysis itself. As such it provides additional opportunity for expansion into the roles provided by norms and state behaviour. The shift of emphasis here is the potential of institutions to reshape participants of the system and their interests, in other words, an 'intersubjective'[34] dimension, which is contingent upon a shared understanding with international law.[35]

2.4.1 Legal Response

As outlined by Anne-Marie Slaughter Burley,[36] prospects for interdisciplinary collaboration occur on four levels; regime distinction,[37] organisational design,[38] compliance,[39] and ethics.[40]

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[31] Distinction between Institutionalism, Liberalism, and Neo-Liberal Institutionalism.

[32] Robert O. Keohane, *International Institutions: Two Approaches*, International Studies Quarterly, no. 32, 1988, p.383.

[33] Robert O. Keohane, International Institutions and State Power, (Westview Press, 1989), p. vii.

[34] See: Friedrich Kratochwil and John Ruggie, *International Organization: A State of the Art on an Art of the State* , International Organization, no. 40, 1986, pp. 763-770.

[35] Anne-Marie Slaughter Burley, DUAL AGENDA, p. 222.

[36] Ibid. , pp. 222-224.

[37] For additional discussion see: Keohane, INSTITUTIONS.

[38] For additional discussion see: Friedrich Kratochwil and John G. Ruggie, *International Organization: a state of the art or an art of the state*, 40 International Organization, 1986, pp. 753-54.

The distinction between 'legal' and 'non-legal' regimes arises from the expansive definition of institutions. Either 'regime' could potentially have a different impact on the state, but neither one necessarily arising from the conventional sources of international law.[41] Therefore a collaboration should take into account issues which affect both disciplines, such as informal agreements. Institutional structures, allow a forum for collaboration between international relations theory and institutional practice, by addressing problems of equal interest. Compliance, such as treaty compliance, is rooted in the basics of regime architecture.[42] The ability to 'measure' compliance, and to delineate the incentives for compliance, are of equal interest to either disciplines. Ethics, a renewal of the 'moralist' debate, is generally a secondary issue, but nevertheless an area of mutual concern to both disciplines.

2.5 The Liberal Claim - A Possible Paradigm

There remains an additional paradigm which will allow for the potential collaboration of law and politics, and which forces the 'rethinking' of the realist and rationalist models. This final paradigm is Liberalism.

The fundamentals of liberalism concern low level forms of co-operation in areas not so politically dominated, such as economic co-operation. This was the key to a

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[39] For additional discussion see: Franck's discussion on Legitimacy and Social Contract in Thomas M. Franck, Fairness in International Law and Institutions, (Oxford: Clarendon Press, 1995), pp. 25-41; Burley, DUAL AGENDA, at notes 91 and 92.

[40] For discussion see: Franck's discussion on Fairness in International Law, Ibid., pp. 3-22.

[41] See explanation and example given in: Slaughter Burley, DUAL AGENDA at note 83, International Court of Justice, Statue Article No. 38, referring to court instructions which distinguish convention rules from customary law.

[42] Abram Chayes and Antonia Handler Chayes, The New Sovereignty Compliance With International Regulatory Agreements, (Cambridge, MA: Harvard University Press, 1995), p. 1.

more integrated society. By desegregating co-operation to a domestic level, it's possible to attain similar interests between states. In segmenting out smaller interests, or integrating the smaller pieces of the puzzle, the larger picture in turn becomes more manageable. In sum, it is a 'concern for liberty'.[43]

Liberal advocates base their thinking on the following set of assumptions. First, the state is not a unitary actor. This differs entirely from Realist assumption placing the state as the starting point for policy. The Liberal model shifts this emphasis to a domestic level by placing segments of domestic society as the start for international politics. Second, the state is not a rational actor. Again differing from the 'power model' of realist politics towards foreign policy decision making, a 'winner take all' strategy. The liberal model seeks to provide smaller, more efficient 'coalitions', than mass scale foreign policy. Third, non state actors are important. Individuals or groups who promote their own interests, are functional members of society and can affect international relations. Fourth, the expansion of the foreign policy agenda: international relations and foreign policy issues are far more extensive than solely the national security issue, and seek to include economic and social issues as part of the debate.

2.5.1 Legal Response

The emphasis which serves as the point of departure for Liberal thinking is placed on the domestic level. Private individuals, not states, are the fundamental actors in politics. State policies and agendas which define the states agenda are all set

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[43] 'While admitting the diversity of Liberal theories, they argue that the core of Liberalism is a concern for liberty.' Joseph S. Nye, NEOREALISM.

by individuals. Their interests, beliefs, identities, will set the national and international standards.[44] It is only appropriate then, that prospects for inter-disciplinary collaboration in legal response concentrates on the importance of domestic constitutional law as both an indicator in emerging societal patterns, and a component of international behaviour.[45] Liberalism recognises private international law as a potential field of collaboration, a relatively 'untouched' area in public international law. Prospects for Liberal co-operation fall on a more 'horizontal' scale as opposed to the traditional vertical model advocated by traditional theories. By re-focusing international law and internalising it toward a more manageable functioning domestic model, there remains as well the likelihood of a more enforceable model.

2.6 Limitations for Collaboration

The main approaches introduced present only half the picture. There remains the necessity to examine the limitations of these models. Doing so satisfies two requirements; first, it seeks to draw the distinction of the common ground on which lawyers and political scientists can most productively collaborate. Second, it creates in itself the argument for an alternative paradigm.

2.6.1 Realism

Limitations in the realist argument lie within the political model's pursuit of 'relevance' in international law. Relevance must hold some form of practicality.

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[44] Andrew Moravcsik, Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach , Journal of Common Market Studies, vol. 31, no. 4, December 1993, p. 483. See also: Andrew Moravcsik, Liberalism and International Relations Theory, Harvard University, CFIA Working Paper No. 92-b.

Simple re-formulation of law from utopian ideal to theoretical policy model, whilst it provides some prospect for interdisciplinary study, does little more than re-invent the wheel. The argument implied here is that realism's meaning is tacit. The nature of international rules are not. But international rules do not automatically constitute international law. International law is a normative system, not a system of rules,[46] which means on some level it is possible to emphasise a common good or the international system would be devoid of order altogether. International law, while not always effective at settling disputes, is always present. Realism's power model assumes that law cannot be part of a real political system, only a theoretical one. Various responses to this assumption maintain the one thread of commonalty; that international law is reflective of authority, which stands in contradistinction with the realist model of power. Not true. At no time can one exist without the other.[47] If authority stands alone, then what is it authoritative of? If the international system is truly a state of anarchy, then what guidelines have determined that? For international law to try and remove the distinction of 'law as counterpoised to politics' it had to accept that distinction in the first place.[48]

Several other limitations are imposed by the realist / positivist cross-disciplinary model. First, it is an unstable framework. Law tries too hard to become policy, in

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[45] See: Burley, DUAL AGENDA p. 228.

[46] See: Rosalyn Higgins, Problems & Process International Law and How We Use It, (Oxford: Oxford University Press, 1995), p. 1

[47] Ibid., pp. 2-12

[48] For critical discussion of realism's useful contribution to world politics see: Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond* , in Paul R. Viotti & Mark V. Kauppi, International Relations Theory, Realism, Pluralism, Globalism, Second Edition, (New York: MacMillian, 1993), pp. 186-227.

doing so loses the role it tries to create for itself.[49] Second, it is not a practical argument. By this I mean it does not account for the changing nature of the international system. Nor does it account for becoming anything more than a sanction based model driven by threat, an 'obey or else' typology, which carries considerably less weight now than it did fifty years ago. Third, it doesn't attempt to explain anything. At least not anything new. The non-compliance of states in the wake of self-interest, and international law's inability to enforce compliance, offers little by way of analysis to the study of extradition and terrorism.

The realist argument for the success of extradition is the case for international co-operation, when examined from the realist understanding maintains that states, not individuals, are the principal actors involved in determining the outcome of an extradition agreement. States pursue their own vital interests, which are founded upon power and security, and are motivated to pursue their own self interests when concluding requests for extradition.

It further assumes that states are anarchical by nature, and tend to overlook values bound to a common good in the wake of self interest, which ultimately, leans towards difficulty in international co-operation and creates problems for enforcement, since in the absence of a legitimate authority, states in an anarchic system are not bound to adhere to international law. This is upheld by the notion of sovereignty, the predominant belief that states are free to act in their own self interest and for their own survival. The modern realist paradigm depicts the primary obligation of states as the advancement of their own 'national interest', characterised by the inherent mistrust of

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[49] An argument carried as well by 'New Stream' legal thinkers. See for example: David Kennedy, *A New Stream of International Law Scholarship*, Wisconsin International Law Journal, vol. 7, 1988

international organisations and international law to defend these interests. This supports the realist notion that states are disinclined to cooperate unless they stand to receive the maximum benefit.

Terrorist extradition in a realist paradigm becomes problematic when states agree that certain acts of terrorism oppose the moral fibre of society, but international agreements designated to combat it are not necessarily adhered to if the consequences prove adverse to state's interest. The implied contract between states bound by the common interest in suppressing terrorism operates within the realm of morality, creating an imperfect obligation.

Again, this adds no new insight to the workings of the international system, nor does it prove a useful model for the overall scope of the project which relies on the states decision making process as well as the extent to which international law was internalised domestically, and, the levels to which states comply with international law. Realism does not provide a useful tool for analysis.

2.6.2 Regimes

Regimes provide an effective point of departure for cross-disciplinary study, in that they seek to provide a rational choice approach drawing on techniques from both law and politics. Within a rational choice framework, greater possibilities exist for co-operation by creating an interactive environment among states facilitating linkage for regime co-operation.[50] Regimes promote greater compliance with international agreements by establishing standards of behaviour and monitoring this behaviour by

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[50] Keohane, AFTER HEGEMONY.

creating 'decentralised enforcement founded on principle of reciprocity'.[51] This is a rationalist view which directly challenges traditions of realism by opening the possibility for co-operation in 'low' political areas, such as economic or social arrangements, as well as 'high' political areas like security, a primary concern of the traditional realist thought. Regime theorists reject a 'peace through law' concept by promoting the idea of 'self help' through encouraging governments to pursue interests through co-operation. The problem is while both politics and law create a favourable arrangement; regime theory assumes an interdisciplinary model based on existing ties between the two disciplines. However, if regimes are to be defined as "sets of implicit or explicit principles,[52] norms,[53] rules,[54] and decision-making[55] procedures around which actors' expectations converge in a given area of international relations,"[56] then several definitional limitations are imposed. Fritz Kratchowil outlines the four major problems with the definition of regimes and their usefulness in analysing international relations.[57] These are; the convergence of two or more criteria causing their distinctive contribution to be lost.[58] The distinction between all criteria, which

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[51] Ibid.

[52] Defined as: 'beliefs of fact, causation, and rectitude.' Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in Stephen Krasner, ed. International Regimes, International Organization, vol. 36, no. 2, Spring 1982, p. 186.

[53] Standards of behaviour are defined in terms of 'rights and obligations', Ibid.

[54] Defined as prescriptions for action, Ibid.

[55] Defined as practices for making and implementing collective action., Ibid.

[56] Krasner, CAUSES, p. 186.

[57] Friedrich V. Kratochwil, Rules, Norms, and Decisions, On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs, (Cambridge: Cambridge University Press, 1995), p. 46

[58] Stephen Krasner, CAUSES, p. 1-21. See also: Robert Keohane & Joseph Nye, Power and Interdependence, (Boston: Little Brown, 1977), p. 19.

eliminates the uniting factor,[59] their prescriptive strength, to be lost,[60] and the lack of criteria differentiating norms, which causes the concept to be lost. Finally, there is also the misleading nature of regimes claiming to successfully unite expectations and norms, which results in co-operation being lost.[61] These limitations imply an unstable framework, as well as an inconclusive one. Criticism implies, further, that regimes are part of a non-ordered system.[62] Which is very different from it's artificial creation designed to bring order.

The model is further limited by the application of international law. Regime theory makes no attempt to unite 'rules' and 'law' in a formalised sense. Rather, it focuses on institutions which facilitate co-operation by empowering governments to pursue their own interests.[63]

This could partially apply to a study of extradition and terrorism, largely because extradition agreements are 'agency driven' forms of legal arrangement. Extradition in itself could be considered a regime. Regime theory has a large breadth of manoeuvrability. By definition, regimes could focus from the very narrow and explicit, such as a particular international agreements, to broader more general aspects such as decision making procedures.[64] However, this application is flawed based on

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[59] Haggard & Simmons: THEORIES, p. 492-3.

[60] Ibid. p. 496

[61] 'Regimes are examples of cooperative behaviour, and facilitate co-operation, but co-operation can take place in the absence of established regimes.' Haggard & Simmons: THEORIES, p. 495.

[62] Ernst B. Haas, Words can hurt you; or who said what to whom about regimes in Krasner, REGIMES, p. 211.

[63] Keohane, HEGEMONY p. 244.

[64] Susan Strange, Cave! hic dragones: a critique of regime analysis, in Krasner, REGIMES.

what regime theory purports. Regime arguments present a 'general theory' for explanation and prediction of political behaviour. No theory can do this.

2.6.3 Institutionalists

The emphasis on institutions as a potential framework for co-operation and collaboration between the two disciplines is lacking. First, it's not really a 'theory'. Institutionalists do not seek to 'explain the world', which they don't, but to explain only parts of it. It is largely a descriptive model. This creates a problem for international law, since law remains a normative system. What remains 'ideal' for states may be impossible to reconcile in reality.

Second, it remains a rationalist approach through which shared beliefs act as a focal point for convergence.[65] This assumes a conscious effort on behalf of state actors who share a common set of beliefs, social norms, and/or expectations. While appropriate for a study on say European Integration, it remains impractical for the study of terrorism.

Third, there is a shift in emphasis back toward the 'state centric' approach.[66] In doing so Institutionalism cannot wholly explain relations between states or on the laws which regulate these relations.[67]

When applied to extradition and terrorism, this model is impractical. The extradition of terrorist A to country B might constitute what should occur, but what if it doesn't? What if it doesn't because the focal point of convergence between the two

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[65] Geoffrey Garrett and Barry R. Weingast, Ideas, Interests, and Institutions: Constructing the European Community's Internal Market in Ideas, Interests, and Institutions, (Cambridge University Press), p. 176

[66] Robert Keohane, INSTITUTIONS, p. 8.

countries is not the belief that 'terrorism is bad'? What if country A doesn't recognise the act as a terrorist act? Now assume there is no way of analysing the law which would apply to extradition anyhow.[68]

The institutionalist model provides more of a set of questions than a framework for analysis. It provides useful groundwork in that they help facilitate co-operation, but there is no room within the model for the application of theory to practice. Nor does it provide a suitable background for empirical research. Instead, it asserts an epistemological approach with little or no room for interpretation.

2.6.4 Liberal Models

At first glance, there appear to be several advantages to utilizing a Liberal model of analysis. Since Liberal models advance from a very different platform than other models, it will naturally open the possibilities to furthering interdisciplinary research. The de-emphasis of the sovereign state stressing its practical limitations in the modern world; the importance of non-state actors as members of society; and the shift of emphasis to domestic society, potentially offer new insights to international law.

Insofar as international law is concerned, the domestic emphasis, acts as a useful legal tool in that it allows domestic law to stand analogous with international law.[69] This paves the way for prescription as opposed to description, a necessity for any

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[67] See: BURLEY, p. 225.

[68] Liberalism relies on proponents of realist tradition and tenets of liberal thought. To develop this arguments, states must be considered anarchical and continuously face mixed interests, such as those presented by a Prisoners Dilemma Model. See: Grieco, *Anarchy and the limits of co-operation: a realist critique of the newest liberal institutionalism*, International Organization, vol. 42, no. 3, Summer 1988, pp. 492-95.

[69] See Anne-Marie Burley, the champion of Liberal thought, who points out: 'The Liberal paradigm casts a very different perspective on supranational law. It is possible that a division of states into liberal and nonliberal states will help us identify the conditions under which international law can be enforced like domestic law, by domestic

empirical study. It also allows for the issue of compliance to be examined from a domestic perspective, vis a vis, the internalisation of international law.

The most obvious deficiency is that Liberal models are not widely applicable, largely because they do not purport anything beyond an eclectic, utopian, framework. There is no useful practicality to this model. Beyond offering potential cross-disciplinary insight and potential collaborative foundations, on a philosophical level, Liberal models offer little by way of real-world applicability,[70] and as noted by Wilkinson, "liberal political thought lacks the systemic character of an ideology."[71]

Second, Liberal models do not purport to accomplish any more than their Realist-Institutionalist cousins. They do not offer potentially more accurate descriptions of state behaviour, nor are they more successful in explaining or predicting the empirical phenomena to the international system. They offer little more than an additional exercise in description.[72]

In terms of the application of terrorism to this paradigm, it would prove to be an impractical model of analysis. Terrorists in many cases[73] are non-state actors; they work outside the parameters of the state. However, because they are non-state actors does not elevate them to a legitimate status; nor does it stand to reason that a regime

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courts. The hypothesis here is that liberal states are ideologically and institutionally best suited for judicial enforcement of international norms; the exemplar is the European Community.' ASIL PROCEEDINGS , p.184.

[70] Anne-Marie Slaughter Burley, DUAL AGENDA, p. 227.

[71] Paul Wilkinson, Terrorism and the Liberal State, (London: MacMillian, 1979), p. 4.

[72] Ibid. p. 228.

[73] Instances of state sponsored terrorism will not be discussed in terms of a theoretical model.

legitimately opposed by force or rebellion can be regarded as a liberal democracy.[74] Terrorism is a fundamental contradiction to the ideology of the liberal state.[75]

A second difficulty in the application of terrorism to a Liberal model, lies in the dichotomy of the liberal tradition. The individual / libertarian elements of these models fail in the areas of law and authority.[76] Liberal models concern themselves with the establishment of liberal state, and not issues of authority, political obligation, or order.[77] There is no war in a liberal model. A true liberal democracy is free from violence. Liberal models struggle with issues such as safeguards against violence which would potentially undermine authority, peace, and security.[78] It would appear that the single greatest limitation in the application of a liberal paradigm to the study of terrorism is the liability the liberal model places on itself.

2.7 The Argument for a Constructivist Model

Existing presently in international relations are several models which possess the components for a cross disciplinary study. But these conclusionary models prove anaemic in their ability to account for a comprehensible working theory for analysis. Demonstrating that international law and international relations provide a common ground for theoretical framework, and a backdrop for empirical application, serves as only half the argument. The remainder, is to examine the domestic decision making

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[74] Wilkinson, LIBERAL STATE, p. 39.

[75] Ibid. at p. 77

[76] Ibid. at p. 4.

[77] Ibid. at p. 5

[78] Ibid.

model of states: the degree to which they internalise international law, and resolve to adhere, or not, to extradition agreements. And, the levels of compliance to which states execute these agreements.

Extradition is not 'law'. It is a rule, concerning the *behaviour* of states in the international system. Compliance is a norm which affects the co-operative efforts of treaty adherence. Terrorism breaks from standard social norms presenting a behavioural phenomenon to the international system. International relations is the study of the state of behaviour - law is a matter of empirical fact.[79] It is necessary for legal reasoning to become a practical model for the purpose of examining and interpreting legal norms through factual presentation, rather than an objective model with determinant conclusions. For this reason, a constructivist model of research design is necessary.

2.7.1 The Constructivist Argument

The main argument for the use of a constructivist theory is the contention held that the political and legal system is not becoming 'less regulated'. Just the opposite. With every new incident, development, accomplishment, there follows a myriad of new regulatory attempts. Characterised by persuasion, coercion, bargaining, and appeals to common standards, all in the absence of a superior authority.[80] It is impossible to explain the international system through the use of conventional theory which purports a concrete international order. Rather, it is necessary to adopt a

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[79] Echoed by Terry Nardin, *Legal Positivism as a Theory of International Society* , in Michael Loriaux, ed., Law and Moral Action in World Politics, (Minnesota University Press, 2000).

[80] See: Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, European Journal of International Law , vol. 2, no. 66, 1991, p. 90.

framework which will draw in these aspects into a interactive, managerial model, as opposed to a systemic, sanction based one.

Constructivism argues against both the anarchical components of realism, and the domestic parallel of liberalism. It does not purport to be a conclusionary model, nor does it rely solely on one method of argumentation for analysis. Constructivism is a social theory, not a political one.[81] The thrust of the constructivist argument relies on the use of language as governed by rules, which analyse the function of norms.[82] This is accomplished by employing components of 'speech-act theory'[83] to understand the underlying implied logic. Speech-act theory distinguishes between three aspects of a statement: the action of a word,[84] it's normative component,[85] and it's impact on those it is conveyed to.[86] This is relevant for assessing the success of communication as an

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[81] See: Martha Finnemore, National Interests in International Society, (Ithaca: Cornell University Press, 1996), p. 27.

[82] '[E]ffective communication takes place when the propositional content of the message matched empirical reality. All other messages were either metaphysical or nonsense. Consequently, since normative statements containing such words as 'ought', 'must', etc., provided no match with objects of the outer world, they could only refer to certain mental or emotional states of the speaker such as to his/her preference or values. On this basis language could be neatly divided into two mutually exclusive sets of 'is' and 'ought' statements. Debates about normative concerns outside of the goal-means context of instrumental rationality, therefore, had to be considered useless because of their lack of 'reference". See: Friedrich V. Kratochwil, Rules, Norms, and Decisions On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs, (Cambridge: Cambridge University Press, 1989), pp. 7-8

[83] J.L. Austin, How to Do Things with Words, (Cambridge, MA: Harvard University Press, 1962), theory of speech acts is the linguistic influence of H.L.A. Hart, The Concept of Law, (Clarendon Press, Oxford, 1961). Kratochwil makes reference to this. See: Ibid. , p. 7. See also: Iain Scobbie, *Towards The Elimination Of International Law: Some Radical Scepticism About Sceptical Radicalism*, British Yearbook of International Law, 1990, p.353 at note 62.

[84] Kratochwil gives an example: '[T]he word 'riding' stands for an action, it functions differently from promising or claiming', Kratochwil, RULES, p. 7.

[85] '[W]hen we authorize or appoint, forbid, grade, or praise, since such actions would not make much sense if there were no underlying norms which provided the meaning for these actions. Similarly, when I make a contract, or promise, I..have to refer to the rules and norms.' Ibid.

[86] '...speech-act theory and the theory of communicative action allow us to analyze the problem of the conditions of effective communication in a new and illuminating way.', Ibid.

important part of our social world in the discourse of social reality.[87] In other words, it emphasises the context in which a statement is made.[88]

Applied to state action constructivism defends an institutional argument which provides its framework for analysis. State action is interpreted as a subjective or causal model, where actions are realised and interpreted by other states.[89] Rules then become part of a communication between states as an indication of intention.[90] This restricts legal reasoning to the specific aim of decision making, based on specific topics[91] which become the base of a *practical legal argument*, specific to legal orders.[92]

Law as applied to the constructivist argument, seeks to establish the validity of legal norms, by rejecting the notion that law is a system of rules. That legal rules and norms do not possess a common characteristic, nor can they be treated simply as institutional rules. For law to be realistic, then the style of legal reasoning must be emphasised with regard to international rules.[93] Constructivism contends that: law is

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[87] Ibid., p. 29.

[88] Scobbie, ELIMINATION, p. 353.

[89] Ibid. p. 354.

[90] Ibid. See: Kratochwil, RULES, p. 56, where he discusses state perception and action: '[G]uidence for decision-making in analogous situations, compliance with these unspoken rules will be unproblematic only when the perception of a common interest is sufficiently strong...However, if states perceive the situation as one of resembling a prisoner's dilemma, rules and norms, which attempt to shore up the cooperative solution, will be under pressure.'

[91] 'There is still another, though interconnected, aspect of practical reasoning that makes the classical rhetorical tradition relevant to law. If it is true that one of the major issues in legal arguments is the discovery of appropriate starting-points for arguments and the assignment of 'weight' to competing value-considerations, then the process of finding premises has to be subjected to close scrutiny.' Kratochwil, RULES p. 41.

[92] '[W]hile 'practical arguments' within a discourse of grievances are potentially interminable, since each party can challenge the arguments of the opponent, more specialized techniques are necessary in order to lend persuasiveness to the finality of an authoritative decision. In law, these specialized techniques are based on certain topoi that are *specific to legal orders*. Their function is largely to justify *exclusions* and thus to limit the range of relevant facts and proofs.' Kratochwil, RULES p. 39.

apart from all other normative systems; that previous sanction based theories are inadequate; that language is the root of rule determinacy since it is interpretative decision which goes beyond established rules to mould the law, and that it must be duty imposing. That law as a system of rules is inadequate, instead; law is a deductive system of norms.[94] Therefore, law is distinguishable from other normative disciplines by the uniqueness of its decision-making style.

Constructivism tries to explain what all traditional theories of international relations seek to explain - state behaviour.[95] However, what this work tries to examine is state behaviour on a domestic level, in an attempt to deal with an international problem, with the use of international rules. What I am trying to show is: under what conditions do states comply with international rules? Why do they create agreements? Why do they agree to comply with these agreements? The constructivist approach allows for is the most useful aspects of conventional theory to be applied in an unconventional manner. Which is appropriately useful since it is being applied to a very unconventional problem -terrorism.

Constructivism is grounded in a rational choice model, and allows for specific topics to be the starting place for discussion, as opposed to the 'systemic-deductive' character of previous models which rely on a 'path dependent' system for legal argument.[96] It allows for the investigation of circumstances in which 'reasons' serve

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[93] Ibid. pp. 186-88.

[94] 'If the constraints for legal decision-making do not lie in the type of norms, such constraints can still lie in the way norms are *used* , ie, in the decision-making *style* which distinguishes legal from other modes of decision-making.' Ibid. p. 193-4.

[95] See: Finnemore, NATIONAL INTERESTS, p. 24-33.

[96] Scobbie, ELIMINATION, p. 357.

as justification for rule adherence.[97] It is an all encompassing theory of communication, yet requires a greater, more detailed discussion, which will define the parameters by which an empirical case study evaluation will take place.

[97] Carty, TRENDS, p. 87.

Chapter Three

Rules, Law, and Norms: The Evolution of the Extradition Regime

> *'The central problem, then, for regime theorists and international lawyers is to establish that laws and norms exercise a compliance pull of their own, at least partially independent of the power and interests which underpinned them and which were often responsible for their creation. To avoid empty tautology it is necessary to show not only that rules exist and that they are created and obeyed primarily out of self-interest or expediency, but also that they are followed even in cases when a state's self-interest seems to suggest otherwise.'*[1]

This chapter is designed to act in tandem with the preceding section providing a complete theoretical model and framework for analysis by which the study of extradition and international terrorism will take place. Previous discussion accounts for the application of a new paradigm, one that transcends traditional schools of thought and accounts for a cross-disciplinary study toward law and international relations. This discussion will continue that paradigm and define the parameters by which case selection, discussion and analysis shall take place. The contents of this chapter are largely descriptive. They have to be in order to define and explain the path of argumentation which is adopted as a framework for analysis. Whilst this strategy is useful for the purpose of this framework, it is not used as, nor is it meant to be, an exhaustive account for all aspects of extradition or terrorism. No framework could accomplish this. What it seeks to accomplish, is a template by which the extradition of suspected terrorists can be applied and discussed through the use of an integrated argument.

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[1] Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach* , Robert J. Beck, Anthony Clark Arend, Robert D. Vander Lugt, International Rules Approaches from International Law and International Relations, (Oxford: Oxford University Press, 1996), pp. 208-209.

Central to this strategy is the use of regimes as the starting point for a model of co-operation. Predicated on tenets of realist thought, regime discussion seeks to reconcile the law and norms versus power and interest debate.[2] However, this is not what is to be examined. It is compliance, and the process by which decisions are made which is the focus, and it is here that regime theory falls short of the mark. Not all decisions made by states are made in the best interest of states. Such as in cases concerning extradition. Often decisions are made for the benefit of the system. Such as in cases concerning extradition of terrorists. Extradition is not an aimless exercise, nor is it a means to an end,[3] but part of both a legal and political process within international society. This is not to say that extradition cannot be considered as a regime, but it simply cannot be examined by the traditional definition of a regime, in my view this strengthens the argument for constructivism.

The aim is to provide an evolutionary account of the extradition regime through the theoretical lens of constructivism. In doing so, it will open several other points of discussion which must be provided as explanation for key terminology used as the basic building blocks for analysis.

The first part of this chapter will address the 'rules, law and norms' debate, it's definition and applicability toward the use of a constructivist model.

The second part will discuss in-depth, regime usefulness and the benefits of a rational choice model within the constructivist argument. Further, how this can be applied to the study of extradition and terrorism, both historically and practically.

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[2] See: Andrew Hurrell's discussion, Ibid. 206-207.

[3] Bassiouni discusses exactly this point, see: M. Cherif Bassiouni and Edward M. Wise, Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law, (Dordrecht: Martinus Nijhoff Publishers, 1995), p. 26.

The third part will examine the role of international agreements in the extradition regime, and the case they create for compliance. In addition, compliance will be examined through the use of a managerial model - contrary to it's traditional sanction driven archetype.

3.1 International Rules and International Law

What is the difference between rules and law? This question requires investigation of two further areas: First, what is meant by international rules? Second, what is the nature of international law? In order to guide the answer, it is necessary to understand the frame of reference from which this is to be discussed, and to identify what is assumed as 'standard'.

First, 'rules' must be placed in a normative context perpetuating the idea that rules and norms are intersubjective by nature, and the operating system they are used is an international society. Second, is the understanding asserted by Kratochwil that 'rules and norms are problem-solving devices for dealing with the recurrent issues of social life: conflict and co-operation.'[4] Further to these ideas is the perception that norms can define the boundaries of conflict; that within these boundaries, rules can create a co-operative environment based on the goals of given actors; and that through norms disagreements on these goals can be negotiated co-operatively through the use of additional actors.[5] This perpetuates the notion of a managerial or 'co-operative' social

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[4] Kratochwil explains further, 'rules and norms link individual autonomy to sociality. On the one hand they leave each actor free to decide for himself/herself which goals to pursue - even to break the rules - while on the other hand they safeguard the conditions of social coexistence.' Friedrich V. Kratochwil, Rules, Norms, and Decisions, On the conditions of practical and legal reasoning in international relations and domestic affairs, (Cambridge University Press, 1989), pp. 69-70.

[5] Kratochwil's 'three ordering functions' perceived as existing in the 'universe of norms'. Kratochwil, RULES, p. 70. For discussion of the distinguishing attributes of 'commands' in international law see John Austin's definition;

model reflective of constructivist concepts, and opposing a sanction driven model grounded more so in traditional concepts of coexistence defined by power.

Finally, the entire normative category created from the emergence of the intersubjectivity between rules and norms is placed from the vantage point of a rational choice model. While this is discussed in greater length further on, it is important to bear in mind throughout that the parameters defined here are viewed through the theoretical lens of constructivist thinking, a concept grounded in rational choice assumptions.

3.1.1 Rules

Rules in general seek to define limits. To control outcome by creating pre-emptive measures. Rules do not necessarily equal law. They are not to be confused with commands.[6] Rules may vary in scope, nature, interpretation, and are virtually limitless in terms of discretion.[7] They are not situation specific but 'delineate *classes* of events by specifying the set of circumstances in which they are applicable,'[8] or the *context* in which they are applied. Consider for example 'the speed limit is 55mph on the motorway'. This is established as measure of safety, to create some form of order on a busy road where many people are travelling. It identifies a potential form of danger whereby exceeding the speed limit could potentially cause an accident. It also

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'A command is distinguished from other signification's of desire, but by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.' John Austin, *A Positivist Conception of Law* adapted from The Province of Jurisprudence Determined, Lectures I and VI, 1832, in Joel Feinberg, Hyman Gross eds., Philosophy of Law, Third Edition, (Belmont, California: Wadsworth, 1986), p. 27

[6] For discussion between rules, commands, and 'instruction-type' rules, see: Kratochwil, RULES , p. 73

[7] Cass R. Sunstein, Legal Reasoning and Political Conflict, (Oxford: Oxford University Press, 1996), p. 21.

creates a limit as to what is allowed. If you're travelling at 65mph, you're breaking the rule. If a policeman were to stop you, he could legally impose a sanction upon you for speeding - or he could let you go. But what if the vehicle you were driving was an ambulance, and it was necessary for you to break the speed limit to get to the scene of an accident. You would still be breaking the speed limit 'rule', but you would be doing so within a given set of circumstances which are applicable in a different context.

Also of some consideration is the delineation between *tacit* and *explicit* rules. Rules define the norm when they are articulated in an explicit manner, unlike the habitual or customary nature of tacit rules. This is not to say that 'rules' need to be explicit in order for 'practice' to exist. Take for example the practice of table manners. Most people in every form of society have at one stage or another taken part in a formal meal, but not everyone is so well schooled as to know 'which fork to use'. If you are told specifically 'you must use the small fork for salad', then it is made clear to you what the 'rules of etiquette' are. You will not be arrested for using the wrong fork, there is no formal enforcement mechanism in place for this. But the rule is merely the manner by which social interaction maintains its fluency.

There are also several classes of rules which affect the social system of international society. Professor Anthony Arend distinguishes five of these rule 'types' which exist at the international level: legal rules, moral rules, descriptive rules, rules of etiquette, and rules of the game.[9] Each of these are distinctive in terms of the

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[8] Kratochwil, RULES, p. 72.

[9] Anthony Clark Arend, *Legal Rules and International Politics. A Constructivist Approach*, Paper prepared for The Georgetown Constructivism Project A Workshop on International Relations Theory and International Law, June 13-14, 1997.

obligation they create, the societal relationship they foster, and the limits of their enforceability.

A moral rule, Arend asserts 'is one that obliges the actor to behave in a particular way.' 'A moral rule', he continues, 'says that a person *must* do something or, conversely, *must not* do something.'[10] The obligation created here is an imperfect one. There is no process which can create a 'moral rule'. There may be certain moral rules which are regarded as 'binding' across a societal spectrum, such as to keep one's promise. But there is no system per se, outside that of a theocratic[11] one, which can enforce such a rule. This should not be confused, however, with an international agreement, which would be regarded under laws of contract and enforceable under *legal* rules.

Descriptive rules generalise about patterns of behaviour for a 'group' of people, within a specified set of circumstances. Similar to the notion of custom.[12] For example: 'it is common practice for students of St. Andrews University to walk along the pier every Sunday.' There is no rule to make them behave this way, they are not obligated to do so. The fact that every Sunday, students walk along the pier, does not imply obligation either. Although one could conclude from observing students every Sunday that such an obligation *does* exist. The importance of descriptive rules, is in

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[10] Ibid., p. 4

[11] The Catholic church for example, can impose sanctionary measures upon it's followers for breaking the rules of the church. For example, a couple can not marry in a Catholic church if one of them has been previously divorced, since the Catholic church as a rule does not recognise divorce.

[12] Sources of law included that of 'customary practice'.

their delineation from legal rules. Or, to convince the observer that 'practice' does not dictate the 'rule'.[13]

Rules of etiquette are social rules mandating specific types of behaviour. They are not required rules through moral, legal, or political means, but they nevertheless require a sense of obligation,[14] such as rules of protocol. 'It is proper to bow before the Queen.' This is not a binding rule. If such protocol is not carried out, it would seem a little excessive to enact legal enforcement. The act of 'bowing' is merely proper etiquette.

Rules of the game,[15] are comprised of tacit understandings in the international system, characterised by 'bounds of mutual expectations'.[16] Such formal understandings have been the basis for balance of power/sovereign equality post-war international relations. Post WWII 'spheres of influence' and the rebuilding of Europe were predicated upon the gentlemen's agreement ensuing from the Yalta Conference in 1945. No formal treaty was ever established, yet the very notion of a 'great power' and the issues of 'security driven politics' were the outgrowth of such 'rules' agreed upon by war time leaders. For the next fifty years, all sides continued to accept this notion, yet no legal obligation was ever established.

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[13] Anthony Clark Arend, Legal Rules and International Society, (Oxford University Press, 1999) p.17. Hereinafter, RULES AND SOCIETY.

[14] Ibid. p. 14

[15] For discussion on 'rules of the game' see: Kratochwil, RULES, pp. 81-88. Also: Arend, RULES AND SOCIETY, Ibid. pp. 15-17.

3.1.2 Legal Rules and International Law

The greatest distinction to be made here is between 'rules' as discussed above, and the concept of international 'legal rules', or international law. Legal rules are characterised by their perception as legally binding. That they are obligatory to those whom the law is meant to be applied. That states obey rules because they *ought* to obey rules.

This rationale drawn from positivist thinking,[17] suggests a 'pure law' approach[18] devoid of any moral overtones.[19] Law is regarded as a normative 'science', consisting of rules which define patters of behaviour. These rules, (or norms) are predicated on previous rules and norms, and work towards a basic 'systemic norm'.[20] This becomes the template for all rules to be held against, making them 'legal rules'.[21] The system is

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[16] Kratochwil, p. 82.

[17] The legal positivists broke from the traditional natural law and divine law thinkers which were based on the belief that there existed fundamental principles of justice and order. Scholars of divine law, held the belief that this order was only known to God, whereas natural law thinkers believed that law could be understood through reason. For further reading on natural law see: Thomas Aquinas, *Summa Theologiae,* in Feinberg, PHILOSOPHY, pp. 11-24. For further reading on divine law see: Cicero, De Res Publica

[18] 'The norm which represents the reason for the validity of another norm is called, as we have said, the 'higher' norm. But the search for the reason of a norm's validity cannot go on indefinitely in search for the cause of an effect. It must end with a norm which, as the last and highest, is presupposed. It must be *presupposed* because it cannot be 'poisted,' that is to say: created, by an authority whose competence would have to rest on a still higher norm. This final norm's validity cannot be derived from higher norm, the reason for its validity cannot be questioned.' Hans Kelsen, *Pure Theory of Law*, in Feinberg, PHILOSOPHY, pp. 38-39. See also M.N. Shaw, International Law, (Cambridge: Cambridge University Press, 1994), p. 45.

[19] Arend discusses the difference between moral and legal rules in stating ' [w]hile moral rules may serve to provide the basis for formulating legal rules and while many legal rules reflect the substance of moral rules, legal rules are not automatically deducible from moral rules....[M]oral rules--which may indeed play a critical role in behavior--give rise to a different kind of obligation. The create an obligation that is owed to something beyond the body poltic. With legal rules, there is a perception that the obligation to abide by the rules is precisely an obligation owed to the body politic.' Arend, LEGAL RULES, p. 6.

[20] Shaw, LAW, p. 46. Although seeded in positivist thought, the concept of 'systemic practice' is also prevalent in constructivism when applied to structures which are reproduced or transformed by practice. For discussion see: Alexander Wendt, *Identity and Structural Change in International Politics*, in Yosef Lapid, Friedrich Kratochwil eds., The Return of Culture and Identity in IR Theory, (London: Lynne Rienner Publishers, 1996), pp.47-64.

[21] Or, in Malcolm Shaw's terms; '[a] rule becomes a legal rule if it is accordance with a previous (and higher) legal rule' Ibid. p 46

predicated, however, on extra-legal concepts such as custom[22] which become problematic when placed onto the spectrum of international law. The practise of states which obey rules because they have always obeyed rules does not explain why custom is binding. Nor does it allow for the continued progression of international law, but ultimately creates a tautological argument.[23] Traditional positivist thinking also defines international law as 'primitive' since it lacks a central governing authority and enforcement mechanisms.[24] From this international law stands not as a means of co-operation, but is characterised as a method of self help.[25]

Legal rules impose a sense of obligation. Moral overtones such as the promise to fulfil agreements, pose this understanding of obligation on a legal level. The principle of *pacta sunt servanda* , or 'agreements are to be kept' is a basic legal principle, and arguably one that makes international relations possible.[26] But there are no criteria in which to demarcate a 'legal' obligation from a 'moral' obligation, or even if the two should in fact be separate. The positivist argument maintains law is 'a set of rules that are created by political authorities', thus allowing it to become enforceable through the political process it was created by.[27] But this does not account for a 'moral sense of obligation'.[28] Enforcement mechanisms such as sanction,[29] although not a mandatory

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[22] 'States should behave as they customarily behave.' Kelsen 'Pure theory of law'

[23] Shaw, LAW, p. 47.

[24] See: Kenneth W. Thompson, Revision of Hans J. Morganthau, Politics Among Nations The Struggle for Power and Peace, Brief Edition, (London: McGraw-Hill, Inc., 1993).

[25] Ibid.

[26] See: Louis Henkin, How Nations Behave, Law and Foreign Policy, (New York: Columbia University Press, 1979), p. 19.

[27] Arend, RULES AND SOCIETY, p. 11.

characteristic of a legal rule,[30] *becomes* the decisive characteristic of legal rules and norms. Ultimately this is the *defining* characteristic of a 'legal rule'.[31] It's inherent weakness, however, is that the notion of sanction does not properly account for perceptions of legitimacy. A rule is legitimate only if it is perceived by those to whom it applies *as* legitimate.[32] It cannot be binding upon those who have not *consented* for it to be binding.[33] And compliance cannot be enforced without the *perception* of violation.

Given this understanding of international 'rules', what then is meant by the nature of international 'law'? Two opposing schools of thought are dominant here: law as a body of rules, and law as a process. Hedley Bull addresses this debate by contemplating both arguments. International law, he defines, ' may be regarded as a body of rules which binds states and other agents in world politics in their relations

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[28] Kratochwil elaborates on this point: 'Positivism appears to avoid the embarrassment of such an insufficient demarcation by substituting an *external* characteristic as a criterion for that of the 'internal' pressure by which actors experience the obligatory force of prescriptions. The *qualitative* test of 'what counts as law' recedes when a *formal* criterion is introduced. Law is now understood as the 'command' of the sovereign and is thus clearly distinguishable from other prescriptions, be they morals, taste, or even edicts and statutes of private associations.'; Kratochwil, RULES, p. 187. See also: John Austin, *The Province of Jurisprudence*, Feinberg, PHILOSOPHY, pp. 26-37.

[29] '*Legal* norms are either those that share a particular characteristic, such as, for example, an attached sanction, or they are those norms which are part of a particular system of rules. In the first case each single rule can be independently examined and its legal character can be established by ascertaining the sanction as a component of the norm in question.'; Kratochwil, RULES, p. 186

[30] 'Although judges are bound by the "law" it can be shown that not all "legal" rules are characterised by sanctions, or form part of a deductive hierarchical system of norms.'; Ibid.

[31] See discussion by Kratochwil, RULES, p. 188.

[32] For further discussion on legitimacy, social contract and the rule of law, see Thomas Franck who asserts: 'When it is asserted that a rule or its application is legitimate, two things are implied: that it is a rule made or applied in accordance with right process, and *therefore* that it ought to promote voluntary compliance by those to whom it is addressed. It is deserving of validation.' Thomas M. Franck, Fairness in International Law and Institutions, (Oxford, Clarendon Press, 1995), pp. 25-46. For discussion on the broad theory of legitimacy see: Martin Wight, Systems of States, Hedley Bull ed., (Leicester University Press, 1977), pp. 153-173.

[33] For discussion on the role of consent in international law see: Lasa Oppenheim, International Law, (London: Longmans, Green and Co., 1920).

with one another and is considered to have the status of law.'[34] Which essentially defines law as 'rules'. However, in terms of the 'process' debate, the influence of law on world politics is a recognised part of social reality.[35] Bull argues to this point:

> *'[i]t may be conceded, furthermore, that the actual social process of legal decision-making, in the international as in the municipal setting, is not a 'pure' process of the application of existing legal rules, but reflects the influence of a variety of factors 'extraneous' to legal rules themselves, such as the social, moral and political outlook of the judges, legal advisors and legal scholars. Moreover, there is a proper place in legal decision-making for social, moral and political principles that do not derive from the law itself.'*[36]

The contention that international law is a 'body of rules' is based on rejecting the tenets of 'Natural' and 'Positivist' traditions. Instead, lies the belief that international legal rules are binding because states regard them as such, and support the notion of sanction as an appropriate response to their violation.[37] As defined by Arend, international law is 'a set of binding rules that seek to regulate the behaviour of international actors by conferring rights and duties.'[38] This argument is founded on several observations; first and foremost, is the rejection of law as a process. While law may be developed and changed through process, it does not undertake the definition of a process. To do so would ignore the presence of specific 'rules' that could be determined at a given point in time.[39] Second, is the belief that legal rules

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[34] Hedley Bull, The Anarchical Society, A Study of Order in World Politics, (New York: Columbia University Press, 1977), p. 127.

[35] Ibid. p. 128.

[36] Ibid.

[37] Anthony Clark Arend, *Toward an Understanding of International Legal Rules*, in Robert J. Beck, Anthony C. Arend, Robert D. Vander Lugt eds., INTERNATIONAL RULES, p. 291

[38] Ibid. p. 290.

[39] Ibid. See also: David Kennedy, *A New Stream of International Law Scholarship*, Wisconsin International Law Journal, vol. 7, 1988.

are binding in international law because they are viewed as obligatory and international actors are *required* to follow them.[40] Third, international law consists of rules which grant both *rights* to states, yet also pose *duties* to states as well.[41] The embodiment of both these factors determines the course of action a state will impose, (either prescription or proscription). Fourth, law as a body of rules applies to international actors; 'peoples', individuals, international organisations, and not just 'states'.[42]

Conversely, the view of law as a process criticises this argument. Adherents of 'law as process' scholarship such as Rosalyn Higgins,[43] argue that law represents more than just 'rules'. By assuming that law is rules alone, one disregards the additional social factors which are a part of law.[44] That rules cannot reflect only 'accumulated past decisions', else law would be unable to meet the challenge of a changing political system.[45] The 'find and apply' method of rules ignores the essential decision making element, and assumes that rules apply regardless of context. This is not the case. International law 'is a continuing process of authoritative decisions',[46] not the mechanistic application of neutral rules. The view of law as a body of rules, does not account for the role of the decision maker in a social or contextual sense. Law

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[40] Ibid. p. 290-91.

[41] Ibid. p. 292.

[42] Arend, UNDERSTANDING, p. 292.

[43] This section only deals with iterations of Higgins' argument. For the full discussion of law as process and not rules see: Rosalyn Higgins, Problems & Process, International Law and How We Use It, (Oxford, Clarendon Press, 1995), pp. 2-16.

[44] Ibid. p. 2.

[45] Ibid. p. 3.

requires choices to be made between norms in a given context. This is not to say the process is a means to an end, and does not abrogate law as a strict policy science.[47] While the 'process' argument recognises ambiguity can direct legal decision making toward a policy-oriented choice, there remains a sense of duty and obligation toward the validity of legal claim.[48] Common interest does serve some purpose here. Whether it enlists it to prevent certain actions either permanently or on a single given occasion, it can adversely affect the outcome of the policy makers, interest. Legal decision making is *event driven*. This is not accounted for by stating that law is a set of neutral rules.

In addition to this reasoning, Ronald Dworkin[49] makes a further distinction between the application of rules and legal 'principles'.[50] Principles add a dimension of specificity to legal decision making on a case by case basis. Rules do not share this characteristic. Decision making then, places rules dependent on specific principles, eliminating the idea of rules as 'static'.[51]

The core of the 'process' argument, and the definitional engine which will drive the basis of further discussion, is based on marriage of process and principle, and

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[46] Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, International Criminal Law Quarterly, vol. 17, no. 58, 1968, p. 59.

[47] Fritz Kratochwil recognises this notion in his discussion of international law as an authoritative approximation toward a public order of human dignity in stating: 'It is precisely for this reason that law, in the conventional understanding of the term, is primarily *not* concerned only with providing guidance toward predetermined ends but also with the legitimacy or illegitimacy of the *means*. It is this specificity which distinguishes law from policy as well as from moral principles.' Kratochwil, RULES, p. 197.

[48] Ibid. pp. 6-7.

[49] See: Ronald Dworkin, *Is Law a System of Rule*, Ronald Dworkin ed., The Philosophy of Law, (Oxford: Oxford University Press, 1977).

[50] 'Standards' of behaviour. See: Krasner, REGIMES, p. 186.

[51] Kratochwil, RULES, pp.193-194.

follows the view of Fritz Kratochwil.[52] The law is not a static-sanction driven set of rules and norms. Law cannot be decided by statutes, treaties and codes. Nor is it a process of 'claims and counterclaims'. Rather, it is a *choice process grounded in the use of norms characterised by principle.* It is a decision making process through the use of reasoning, which 'can only be ascertained through the performance of rule-application to a controversy and the appraisal of the reasons offered in defence of a decision.'[53]

3.2 The Role and Function of Norms

To claim that *states are goal oriented* would be an accurate assertion.[54] This notion along with the concept of states interest,[55] dominated post-war international relations and championed tenets of realist thought.[56] However, in the state's effort to achieve their goals, there is every likelihood that one state's pursuit will interfere with that of another goal-pursuing state. The potential for conflict and confrontation are in many instances avoided through the use of communication. And ultimately through the use of language, states are enabled to pursue their goals.[57]

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[52] Ibid., pp. 181-211.

[53] Ibid., p.18.

[54] Nicholas Greenwood Onuf, World of Our Making, Rules and Rule in Social Theory and International Relations, (Columbia, South Carolina: University of South Carolina Press, 1989), p. 69-70.

[55] For discussion of states interest and the use of norms see: Friedrich Kratochwil, *On the notion of 'interest' in international relations*, International Organization, vol. 36, 1, Winter 1982.; W. David Clinton, The *National Interest: Normative Foundations*, Review of Politics, vol. 4,4, 1986.; Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, Yale Journal of International Law, Vol. 14:335, 1989.

[56] See: Hans Morganthau, In Defence of the National Interest, (New York: Knopf, 1951); Hans Morganthau, Kenneth W. Thompson Ed., Politics Among Nations, The Struggle for Power and Peace, Brief Ed., (New York: McGraw-Hill, 1993).

Criteria for the framework utilised in the examination of norms are Kratochwil's, and similar concepts as applied by Austin, Onuf, and Franck. The research design adopted here is a constructivist argument. Which, as stated previously, relies on tenets of speech act theory.[58] Functionally, this divides a statement into three integral parts: action, normative components, and impact. In order for communication to be 'successful', such statements must be situation-specific, or dependent on the *context* in which the statement was made.

The action of a statement performs in a specific capacity, such as 'warning'. This is different from the 'proper' definitional use of an 'action' word, such as running, walking or sleeping. These are 'referred' actions that behave descriptively and therefore independently, as opposed to 'warning', 'claiming' or 'threatening'[59] which require performance of the action and not just referral.[60]

Normative components provide meaning for action. To 'authorise' is an action, but would carry little meaning without a normative component to provide its significance. It is this reference to norms which provide the constitutive agent that makes norms relevant.[61]

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[57] 'We demand, warn, threaten, claim, criticize, assert, consent, suggest, apologize, pressure, persuade, praise, grade, promise, forbid, appoint, authorize, contract, or even bet, in order to further our goals.' Kratochwil, RULES, p. 7.

[58] Refer to discussion in Chapter 2. See also, John Austin, How to Do Things with Words, (Cambridge, MA: Harvard University Press, 1962). H.L.A. Hart, The Concept of Law, (Oxford: Clarendon Press, 1961).

[59] Kratochwil makes special reference to norms and the term 'threatening' as a speech act, 'thereby suggested that threatening is a norm-governed activity. Threats seem to be particularly characteristic of international relations, and their link to coercion and violence makes it appear that threats, stand in opposition to norms, law, and order. Promises and threats, however, might actually have much more in common than is assumed in this conventional dichotomy. The effectiveness of both might depend on certain common normative understandings.'; Kratochwil, RULES, pp. 8-9. and discussed further in Chapt. 2, pp. 45-68.

[60] Kratochwil, RULES, p. 7,28-9

[61] Ibid.

The impact of a statement, stems from the analysis of both aspects in tandem. Where conventional analysis fails is that it takes into account only the meaning to which the content referred, or that 'effective communication takes place when the propositional content of the message matched empirical reality.'[62] From this traditional language analysis was divided between what 'is' and what 'ought', and ignoring normative concerns since there was no frame of reference which it could be adhered to. What speech act theory provides is the distinction between the 'locutionary' aspect of a statement, the 'illocutionary' force it provides, and its 'perlocutionary' effect.[63] As a result, it is possible for actors to establish forms of obligation,[64] but actors *must resort to norms* [65] in order to do so.[66]

Kratochwil outlines three assumptions toward the use of norms as a research strategy, which this work will adopt as well. First, norms shape decisions in terms of a public choice approach. This means that, the base for analysis rests on the contention that state actors are distinct, and predisposed to survive in a system governed by their own self interest. They make choices based on the knowledge that they are a part of this system, and their decisions will affect future interactions with

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[62] Ibid. See also: Jürgen Habermas, Theorie des kommunikativen Handelns, (Frankfurt: Shurkamp, 1981)

[63] Ibid. p.8. Kratochwil re-enforces this point in rejecting 'classical logic' and epistemological implications: 'Thus while classic logic assumed that communication among actors is possible on the basis of propositional content, which, in turn, is safeguarded by certain truth functions, the discussion of speech acts showed that such a conception of language is inadequate. Truth and falsity are appropriate criteria only when applied to propositions. Neither the illocutionary nor the perlocutionary effect of speech acts can thereby be analyzed. However, since promising, contracting, asserting, etc., are important parts of our *social* world, we cannot simply exclude these aspects from out theorizing about social reality.' RULES, p. 29

[64] Kratochwil observes on this point: 'The binding character of contracts, as mutual promises, depends for its validity not on the 'reliance' which one of the contracting parties might have placed on the promise of the other, but on the institution of the contract itself. Not the *perlocutionary* effect but the *illocutionary* force of the mutual promises establishes the binding character of contracts.', RULES, p. 28.

[65] 'Norms, therefore, more than assertions, are dependent upon the *success of communicative action*, i.e., their perlocutionary effect.', RULES, p. 34.

other actors. The function of norms then, must be to reduce the complexity of these choices by acting as guidance devices which delineate 'the factors that a decision-maker has to take into account.'[67]

Second, norms are not only guidance devices for choice, but explain *why* a particular type of behaviour takes place. This is mainly dependent on context, and specific aspects of a situation which require norms to be invoked. Self-interest then, is not a viable option, as it makes no reference to norms.

Third, it is through a reasoning process, a process of deliberation and interpretation, that choices are influenced. This requires a model of practical legal reasoning toward decision making. Traditional rational choice models which are typically used to analyse decision making, fail to account for any reasoning process. Rational models are predisposed to concern themselves with preferences, and priority of preferences, which are dependent on the weight of a claim. They tend to ignore aspects of language and social interaction.

Reasoning with rules and norms cannot be measured in terms of an arbitrary process, but must depart from classical models of rational action, and be examined in terms of criteria in the form of a practical model. When legal reasoning is placed within this context, it is possible to analyse the change in discourse of legal argumentation. It is the legal reasoning process which is to be examined here, and rules and norms are regarded as the nucleus of legal reasoning. Despite difference in opinion with respect to the outcome of legal decision-making, the *legal reasoning process* provides commonalty which can be examined, and agreed upon, from all

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[66] Ibid., pp. 30-34.

sides. The importance of norms must transcend traditional debates and account for their influence on decision-making and creation of social order in a system governed by self-interest. For this purpose the constructivist model relies on tenets of rational choice as posed by the traditional debate on regimes.[68]

3.3 Regime Evolution

'Regimes' are social structures. They establish 'recognised patterns of behaviour around which expectations converge'.[69] They appear as either formal agreements or informal understandings, through either implicit or explicit arrangements. Regimes themselves, however, are not 'arrangements' which constantly change concurrently with shifts in power and interest. They are not functions, although they seek to fulfil specific functions. They are not agreements, although their purpose is to facilitate agreements.

Regimes act as the intervening variable between basic causal factors, and behavioural outcome. Regimes are not epiphenemonal - they are man made. They are not ends in themselves, nor are they a 'means to an end', but structures which guide conduct. They provide a rational choice model from which to pursue angles of co-operation through the use of both law and politics by emphasising rules and principles as links toward agreed norms.[70]

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[67] Ibid. p. 10

[68] Ibid. p. 45.

[69] Oran R. Young, *Regime dynamics: the rise and fall of international regimes* , Krasner, REGIMES, p. 277 See also: Robert Keohane and Joseph Nye, Power and Interdependence, (Boston: Little, Brown, 1977); Hedley Bull, The Anarchical Society: A Study of Order in World Politics, (New York: Columbia University Press, 1977).

[70] See: Ernst B. Haas, Why Collaborate? Issue-Linkage and International Regimes, World Politics vol. 32, 1980.

'International regimes'[71] involve those activities which are of interest to members of the international system. These activities are not actions which take place on a domestic plane, but extend the boundaries by falling outside the jurisdiction of sovereign states.[72] They are actions which cut across the international lines, or which involve interests of two or more state actors. International regimes engage sovereign states as their focal point, although actions implemented by international regimes very often employ non-state entities.[73] International regimes defined, are distinctly divided sets of rules,[74] norms, and decision making procedures which confine themselves to a given area of international relations.[75]

The core problem regime theory seeks to solve is the potential for co-operation between two sovereign states competing for power and influence in an anarchical system. Arguments drawn in criticism of this, revisit the law and norms versus power and interest debate, claiming regime theory only reworks the power politics idiom.[76] Problematic in international law within this framework is the duality between the practice of legal rules (reinforcement of state sovereignty) and its very definition (constraints upon sovereignty).[77] But if rules and norms are reflective only of state's interest, then it is state's interest *only* which mandates compliance, leaving rules and

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[71] For a more thorough discussion on International Regimes see: Oran R. Young, *International Regimes: Problems of Concept Formation*, World Politics, vol. 32, 1980.

[72] For example, high seas fishing, deep seabed mining, exchange rates.

[73] See Oran Young's discussion in Krasner, REGIMES.

[74] Inclusive of 'explicit' rules, informal understandings, convergent expectations, see: Krasner, REGIMES

[75] Krasner, REGIMES, p. 186

[76] Hurrell, SOCIETY, p. 207.

[77] Ian Clark, The Hierarchy of States, Reform and Resistance in the International Order, (Cambridge: Cambridge University Press, 1991), p. 25.

norms as formal exercise and empty of meaning. The problem that remains for regime theorists, then, is to show that rules and norms exercise a 'compliance pull' independent of the power politics responsible for their creation. Further, to show that rules and norms are followed conversely to state's interest. The central question, however, which unites both international relations theorists and international lawyers despite this fundamental differences is: how useful are regimes?

3.3.1 Benefits of a Rational Choice Model

Patterns of international relations cannot be entirely explained in terms of regimes any more than they can be analysed in terms of power. Human action and interaction is essentially rule governed,[78] which presupposes that decision-making is largely guided by rules and norms which become part of a deliberation process. It is the focus of this decision making process though, which constructivist thinking seeks to depart from traditional rational choice behaviour.[79] Utilising the regime debate as a point of departure[80] allows for norms to be examined separately from assumptions imposed by realism or legal analysis.[81]

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[78] Kratochwil, RULES p. 43

[79] '[T]he question of how rules and norms guide choices, particularly in cases in which several independent actors have to come to a joint decision, can be posed in a new way. Rules and norms mold decisions via the reasoning process (deliberation). This process departs - especially in the cases of groups - in significant ways from the model of instrumentally rational action.' Ibid.

[80] Kratochwil writes on the utilisation of regimes as a starting point for debate'...it is clear that we have to overcome the conventional conceptual limitations which impeded more than helped traditional analysis.....Such a strategy appears to be useful because the focus on regimes provides an approach to the function of norms in international relations without involving itself in the quagmire of realist assumptions, or in the often arcane squabbles of legal analysis.' Ibid. pp. 45-46.

[81] 'International lawyers have long acknowledged the existence of international regimes, but account for their legality by mere incorporation into the international legal order. International Relations scholars, who discovered international regimes only recently and without much awareness of lawyers' concerns, have assiduously avoided calling them legal. Both groups miss the central feature of regimes: They are sets of rules, a substantial number of which (especially those giving the regime its scope and coherence) are legal rules. Both groups miss this point

Two main issues arise from the traditional rational choice approach which need to be addressed through a 'constructivist' lens. First is the question of regime change.[82] Regimes are not temporary arrangements which fluctuate with shifts in power or short-term interest,[83] they are designed to *facilitate* agreements.[84] It is norms which provide the defining principles of regimes, not their 'rule' and 'decision making' components.[85] Changes in regimes represent a change in norms toward a given issue,[86] not changes in rules or decision making which reflect changes *within* the regime and not the regime itself.[87]

This focus on regime change obscures the usefulness of regimes, making them little more than reflections of power, and providing an ambiguous understanding for the way norms affect decision making.[88]

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because of their joint attachment to legal positivism, which accords or denies legality to rules by the set and not rule by rule.' See: Nicholas Greenwood Onuf, World of Our Making, Rules and Rule in Social Theory and International Relations, (Columbia, South Carolina: University of South Carolina Press, 1989), p. 145.

[82] For discussion on theoretical approaches to regime change and variance see: Stephan Haggard and Beth A. Simmons, *Theories of international regimes*, International Organization, vol. 41, no. 3, Summer 1987, pp. 498-500.

[83] The distinction between 'regimes' and 'arrangements' is made here: 'Agreements are *ad hoc*, often 'one-shot' arrangements. The purpose of regimes 'implies not only norms and expectations that facilitate co-operation, but a form of co-operation that is more than the following of short-run self interest.' Robert Jervis, *Security Regimes* , in Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 'International Regimes', International Organization, vol. 36, no. 2, spring 1982, p. 357. See also: Krasner, REGIMES, p. 187.

[84] Krasner, REGIMES, p. 187.

[85] 'A fundamental distinction must be made between principles and norms on the one hand, and rules and procedures on the other. Principles and norms provide the basic defining characteristics of a regime. There may be many rules and decision-making procedures that are consistent with the same principles and norms.' Ibid.

[86] "When norms and principles are abandoned, there is either a change to a new regime or a disappearance of regimes from a given issue-area.' Krasner, p. 188 See: Charles Lipson, *The transformation of trade: the sources and effects of regime change* , in Krasner, REGIMES, pp. 417-422.

[87] Krasner, REGIMES.

[88] As Kratochwil points out: 'What remains unclear is why actors follow rules in the first place and why even hegmons find it often necessary to resort to norms rather than to direct imperative control based on their 'power'.' Kratochwil, RULES, p. 46. See also: Kratochwil, *The Force of Prescriptions*, International Organization, 38, (1984), 685-708.

Second, is the notion of regime strength. Regimes become weakened when the principles, norms, rules and decision-making procedures which comprise the regime are inconsistently observed. This also implies that the basic norms which initially establish the regime are challenged on a fundamental level, since regimes are dependent on normative understandings. Decision-making which draws from the inconsistent application of rules and principles, undermine the actual practice of the regime's intention. When the component parts of a regime are conflicting - the regime is effectively weakened.[89]

The textbook example of such regime limitation appears specifically in security regimes,[90] however, crucial to this reasoning are assumptions of interest and co-operation. Robert Jervis convincingly argues security and regime weakness,[91] by providing that regimes can only exist under specific conditions.[92] Further, he argues that regimes may only exist when established norms can provide specific types of co-operation, under specific circumstances,[93] and that there is in fact a distinction to be made between short term and long term interest when facilitating co-operation within a regime.[94] Furthermore, he argues that there must be evidence of this co-operation.[95]

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[89] Such is the case with decision making and security regimes, see: Robert Jervis, *Security regimes*, in Krasner, REGIMES, pp. 357-362.

[90] Kratochwil's discussion on Robert Jervis, 'Robert Jervis maintains that the incentives in the field of security are likely to defeat the establishment of security regimes, and that the obstacles to maintaining them are also particularly severe...'security regimes' can only come into existence under very unusual circumstances...a security regime exists only when the established norms facilitate not only co-operation but a co-operative stance of a *particular* kind.' Kratochwil, RULES, p. 47.

[91] See: Jervis, SECURITY.

[92] Jervis, SECURITY; Lipson TRANSFORMATION.

[93] Jervis, SECURITY.

[94] Ibid.

Since the focus here is not on interest but norms, to assume that interest alone can explain co-operation leaves the argument to invariably resort back to a power model, leaving norms and regimes as epiphenomenal.[96] This is not the force of the argument. It is norms which provide the pillars for a constructivist model, and allow for solutions to form through the use of a socially integrated model. Specifically, the internalisation of these norms, and how decision making 'bridges the gap among actors who know very little, or virtually nothing, about each other'.[97]

A rational choice model is a useful approach toward a study of norms since it provides a model from which norms and social interaction may be approached. The distinction to be made, however, is that the teleological structure present in conventional models is abandoned. In order to provide a clear understanding of how norms work, the variance between implicit (or tacit), and explicit rules toward norms, principles and compliance,[98] must become the point of examination.

3.3.2 Extradition as a Regime

Extradition serves as a rich illustration for the study of norms in decision-making. Specifically since extradition is by all formal definitions an international rule, it allows for the transfer of fugitive criminals from one sovereign state to another, through a process of international agreements.[99] These agreements may be standing

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[95] Ibid., pp. 361-62.

[96] Kratochwil, RULES, p. 48

[97] Ibid.

[98] Ibid., pp. 52-56.

[99] For basic texts defining extradition and it's fundamental principles, see: Ian Shearer, Extradition in International Law, (Manchester University Press), 1971; Geoff Gilbert, Aspects of Extradition Law, (Dordrecht:

treaty agreements or ad hoc arrangements; nevertheless, they are international creations executed by domestic legislation. Extradition is a social relationship between states in the international system, dependent on the crucial acceptance of normative understandings of what constitutes a criminal act.[100] When extradition fails, it is often because one actor did *not* share this common understanding of what constitutes a criminal act, or because what constitutes a criminal act in one state is not necessarily understood as criminal behaviour in another, or that states did not somehow share the belief that there is a common interest in extraditing the criminal.[101] The establishment of norms predicated on a common understanding becomes important, if for no other reason other than to ensure it's success.

Martinus Nijhoff Publishers, 1991); John Murphy, Punishing International Criminals, (Rowman & Allanheld, 1986). For a more in-depth understanding see: M. Cherif Bassiouni and Edward M. Wise, Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law, (Dordrecht: Martinus Nijhoff Publishers, 1995).

[100] 'Extradition is itself a development from the theory of asylum. In the ancient Greek city states we have been told that asylum was granted to everyone, whether his offence might be described as political or otherwise. In the Middle Ages the primary purpose of extradition treaties was in fact to provide for the punishment of political offenders who became fugitives and sought to escape punishment by fleeing to other jurisdictions. It was understandable that this should be the case, for whilst absolute monarchs might well war with one another, they maintained a common interest in securing by treaty the arrest and punishment...of those who sought to overthrow their regimes.' Peter Sutherland, *The Development of International Law of Extradition*, St. Louis University Law Journal, vol. 28:33, 1984, p. 33. See also: J. Verzijl, International Law in Historical Perspective, (Klewer Academic Publishers, 1992); I. Shearer, EXTRADITION; Paul O'Higgins, *The History of Extradition in British Practice 1174-1194*, Indian Yearbook of International Affairs, vol. 13, 1964.

[101] Cherif Bassiouni proposes a conceptual framework for extradition based on five interlocking principles: 1) the recognition of national interest of states who are parties to the extradition; 2) existence of an international duty to preserve/maintain world public order; 3) effective application of minimum standards of fairness and justice to the relator in the extradition process; 4) collective duty on behalf of all states to combat criminality; 5) the balance of all these factors within the judicial framework of the Rule of Law. This is based on the rationale that: there exists a sense of duty to preserve and maintain world public order which in theory, does not destroy national sovereignty. That the enforcement of extradition is a matter of concern on behalf of the world community. That mutual assistance reinforces effectiveness. That adherence to the Rule of Law is the only safeguard for the guaranteed survival of mankind. In the 'real world', however, the balancing act between these factors and rationale, is generally naive. See: M. Cherif Bassiouni, *Ideologically Motivated Offences and the Political Offences Exception in Extradition - A Proposed Juridical Standard For An Unruly Problem* , DePaul Law Review, vol. XIX, no. 2, Winter 1969. pp. 222-223. Also: M. Cherif Bassiouni, *International Extradition in the American Practice and World Public Order*, Tennessee Law Review, vol. 36, no. 1, 1968.

Consider for example, the problem of political offence.[102] Broadly interpreted, political offence in extradition implies two definitional categories.[103] It can imply a 'pure political offence',[104] which is bereft of the common crime element.[105] Or, it can refer to a 'relative political offence', in which the common criminal element is implicit in, or connected to, a political act.[106] The latter definition creates the problem for norms and decision-making. If a crime is not entirely criminal, yet not entirely political, then there is no consensus to what constitutes a political crime.[107] This is best exemplified when applied to cases involving the extradition of wanted terrorists.

3.3.3 Terrorism and Political Offence

The earlier challenges terrorism[108] posed to states stemmed largely from the international community's difficulty in unilaterally defining it;[109] but this is certainly

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[102] The 'right to asylum' was considered to be part of extradition's crude beginnings. The Roman tradition of surrendering of offenders of ambassadorial privileges, which could surrender Romans to Romans was based on the ancient city-state Greco-Roman set-up. Common fear of retaliation between hostile Greece and Rome was considered to be the crudest beginnings of modern political offence. See: Bernabe Africa, Political Offences in Extradition, (Manila, Benipayo Press, 1926), pp. 4-5.

[103] 'Plainly a matter of significance in defining whether a particular crime is of a political character is the issue whether the definition should be objective or subjective, or alternatively whether the definition should combine elements of both. If a crime were to be defined as political merely because the motivation of the actor was to bring about a political end, for example the overthrow of a regime, such a definition would bring within its ambit many acts that would be universally condemned by the civilised community. Alternatively, the objective test, which would be related to the consequences of the act rather than the motivation of its author, could itself create unfair results.' Sutherland, DEVELOPMENT, p. 35.

[104] Pure political offences are not considered to be extraditable offences - they are 'directed solely against the political order'. Shearer, EXTRADITION, p. 185.

[105] An exhaustive concept in French and Belgian literature. See: Lora L. Deere, *Political Offences in the Law and Practice of Extradition*, The American Journal of International Law, vol. 27, 1933, p. 248 at note 7.

[106] The distinguishing factor between the politcial crime and the common crime is 'the fact that the former only affects the political organization of the state, the proper rights of the state, while the latter exclusively affects rights other than those of the state.'

[107] See: Deere, POLITICAL OFFENCE, *Supra* note 30; Catherine Nicols Currin, *Extradition Reform and the Statutory Definition of Political Offence* , Virginia Journal of International Law, vol. 24, no. 2, 1984.

not so today. There is a widely shared perception in the international state system of what terrorism is, and as discussed earlier in Chapter 1, that it is important to cooperate to combat it.[110] However, many of the laws initially designed to combat terrorism, ultimately served as a means of legitimising it. Certainly there are nations who regard terrorism as a legitimate method of warfare,[111] and of internal repression and control, thereby making many of the laws already in place, such as extradition, unable to effectively deter those who rely on violence to advance their cause. This is particularly the case in politically motivated terrorism,[112] since it allows the fugitive terrorist to justify his actions by linking them, however tenuously, to a political cause or ideal,[113] albeit the political offence exception is a prevailing feature in almost all extradition treaties, there remains no clear-cut definition of what political offence is.

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[108] The term 'terrorism' understood colloquially as it stems from the 'Jacobin Reign of Terror' during the French Revolution. See: G. Lewis & C. Lucas, Beyond Terror, Essays in French Regional and Social History, (Cambridge: Cambridge University Press, 1983).

[109] 'The term 'terrorism' has no precise or widely accepted definition. If it were a mere matter of description, establishing a definition would be simple: Terrorism is violence or the threat of violence calculated to create an atmosphere of fear and alarm - in a word, to terrorise - and thereby bring about some social or political change...The difficulty in defining terrorism has led to the cliché that one man's terrorist is another man's freedom fighter. This phrase implies that there can be no objective definition of terrorism, that there are no universal standards of conduct in conflict.' Brian Michael Jenkins, *International Terrorism: The Other World War*, in C.W. Kegley Jr., International Terrorism, Characteristics, Causes, Controls, (New York: St. Martin's Press, Inc., 1990), p. 28-29. See: Report of the Ad Hoc Committee on International Terrorism, 28 U.N. GAOR Supplement No. 28, U.N. Document A/9028, 1973.

[110] Chapter 1.2.2.

[111] Such as States which view violence as a legitimate part of a liberation movement. See: Comments by N. Kittrie, *Terrorism and Political Crimes in International Law*, American Society of International Legal Practice, 87, 1973, p. 104-5.

[112] Political terrorism as defined by Wilkinson, 'may be briefly defined as coercive intimidation. It is the systematic use of murder and destruction and the threat of murder and destruction in order to terrorise individuals, groups, communities or governments into conceding to the terrorist's political demands.' Paul Wilkinson, Terrorism and the Liberal State, (London: MacMillian, 1977), p. 49.

[113] Political terrorism itself, may be broken down into it's constituent parts as well, between political terror and political terrorism. The former, allows for extreme, indiscriminate, and usually isolated acts, which are unorganised and difficult to predict or control. While the latter, is indicative of a policy of orgainsed terror on behalf of a state, movement, or group of individuals, which holds some form of organisation or structure, as well as some kind of ideology. See: Grant Wardlaw, Political Terrorism, Theory, Tactics, and Counter-Measures, (Cambridge: Cambridge University Press, 1989), p. 13.; Wilkinson, TERRORISM.

Generally, political offence is recognised to have two levels of meaning.[114] First is the idea of a 'pure political offence', which stands for acts committed entirely against the state and devoid of any real criminal element, such as treason, espionage, or rebellion. These stand as primarily crimes against the state, and seek no real personal gain on behalf of the individual, but rather to further a political ideal. The second, is where a criminal act is a result of a political motivation, rendering the crime 'political'. These crimes tend to be more 'criminal' than 'political' in nature, and not surprisingly, occur more frequently than the former, creating much of the ambiguity for this idea of political offence in extradition. The delicate issue becomes, to what degree is the criminal act and the political motivation connected, and if the act is deemed political, does it hence become unextraditable.[115]

This is illustrated historically through the chronology of legal decisions which serve as the foundation for political offence. The benchmark case for determining political offence, *In re Castioni*,[116] adjudicated in 1891. Angelo Castioni, held responsible for the murder of a member of the Swiss Canton, Luigi Rossi, during an uprising over the Swiss Federal Council's refusal to call a referendum to the constitution. As a result, the group seized the town arsenal, taking the guards hostage and marching toward the palace. Upon entering the palace, Castioni shot and killed a State Council member. Castioni fled to England, charged by the Swiss government for murder, and who sought his extradition. The British courts ruled that 'fugitive

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[114] See, e.g., Antje C. Petersen, *Extradition and the Political Offence Exception in the Suppression of Terrorism*, Indiana Law Journal, vol. 67:3, 1992, pp. 773-8.

[115] Bradley Larschan, Extradition, The Political Offence Exception And Terrorism: An Overview Of The Three Principle Theories of Law, Boston University International Law Journal, vol. 4:231, p.250-251.

[116] 1 QB 149, 1891.

criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.'[117] In addition, they observed that 'an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason.'[118]

Three years later, the British courts were challenged again with the case which would re-define the parameters of political offence - *In re Meunier*, 1894.[119] Meunier was a self proclaimed anarchist, who bombed a Paris café killing two persons, then fled to England where he claimed his acts were political. The British courts rejected this claim on the grounds that his crimes were not of political character since there was in fact, no uprising.[120] That the crimes of an anarchist, were in fact, crimes against all forms of government, not part of a political uprising, and therefore not of political character.

The modern interpretation, and the effect these precedent cases have had on international terrorism, show that original interpretation has changed little. This was exemplified in the 1979 case of *In re McMullen.*[121] McMullen alleged was a British Army deserter who joined the Provisional Wing of the Irish Republic Army (PIRA), and was charged with the bombing of British Army barracks in 1974. Apprehended

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[117] Dissenting opinion of Justice Hawkins, 1 Q.B. 164-66. See also *Regina v. Governor of Brixton Prison - Ex Parte Kolczynski*, 1 Q.B. 540, 1955.

[118] Hawkins dissent at 167.

[119] 2 Q.B. 415, 1894.

[120] Justice Cave observed: 'In order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not.' 2 Q.B. 419.

in the United States five years later, Great Britain sought his extradition under the U.S.-U.K. Extradition Treaty, where McMullen charged his extradition was sought for offences of a political nature. The Magistrate ruled in favour of McMullen claiming that there was at the time of the bombing, a political insurrection occurring in Northern Ireland, and that McMullen's actions were part of that incident.[122]

That same year, the Magistrate had rejected the political offence defence in *Abu Eain*.[123] Eain was charged with killing two Jewish males and wounding over thirty others, when he detonated an exploding device in a trash bin in a commercial market place in Israel. When apprehended in Chicago, Israel sought his extradition under the U.S.-Israeli Extradition Treaty, which Eain protested claiming that his acts formed part of a political offence. His claims were denied by the U.S. court who ruled the acts were of an indiscriminate nature and not aimed toward a political objective.[124]

The degree to which political offence affects extradition extends far beyond the parameters of extradition law itself in terms of it's scope and its usefulness. If it is to retain any importance in extradition law, then it must assess the nature of the act, and the context in which it is committed,[125] in order to balance 'the protection of human rights with the need to preserve international public order.'[126]

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[121] Magistrate No. 3-78-1099, May 1979.

[122] The magistrate ruled that McMullen 'acted as a member of PIRA...his activities were directed by PIRA and...the bombing was a crime incidental to and formed part of a political disturbance'.

[123] Mag. No. 79 M 175, December 1979.

[124] The magistrate ruling was that the 'random and indiscriminate placing of an explosive near a bus stop on a public street in a trash bin diffuses any theory that the target was a military one or justified by any military necessity...commission of these alleged offences is so remote from the political objective that it could not reasonably have been believed by the offender to have a direct political effect on the government of Israel; nor was it directed at the government of Israel.'

[125] See comments by Justice Sprizzo as per In re Doherty, in Geoff Gilbert, ASPECTS, p. 133.

If we are to consider extradition as a constructivist 'regime', then several factors must be in place. First, there must be established rules and norms. Rules must meet certain criteria. They must be legitimate.[127] They must be stated indicating their circumstance and range of application, and they must be applicable to all.[128] They must empower, and they must do so as part of a larger normative context.[129] Norms alternatively, must be understood in the context they are presented. Commitments must be expressed either explicitly through rules, or implicitly through customary binding obligation. Extradition is an engineered agreement. The agreeing parties create the rule. The rule is understood as legitimate. This is an explicit understanding. A more tacit understanding, while binding under international law, is considerably more difficult since custom, declarations, and 'unspoken rules', are never specifically defined. Thus the rule loses its communicative function.

Second, rules must be justified in proper context. States expect extradition agreements to be fulfilled, that is the rule, but this is not a 'given'. What may appear as an 'acceptable' request for extradition, may not be applicable in a given normative context. For example, a state is not under any obligation to extradite a fugitive who may face the death penalty in the requesting state.[130] Capital punishment is not a generally accepted norm. Nor is a state required to surrender one of it's own

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[126] Ibid. p. 139.

[127] Kratochwil, RULES, p. 53

[128] 'Commands' are 'situation specific' whereas 'rules' are applicable to all. Ibid.

[129] Ibid.

[130] A provision inherent in several model international agreements, and bilateral interstate extradition treaties. The death penality provision and the potential effect on extradition will be discussed later on in Chapter 7.

citizens.[131] Rights of citizenship are generally accepted behaviour, regardless of what is 'expected'.

Third, is the deliberation between rules and norms. There exists the question whether rules are in fact 'rules' or merely tacit norms. Are states obligated to extradite in the absence of an extradition treaty because it is implied that the asylum state shares the similar interests of the requesting state? What if extradition has been carried out before between these two states without the benefit of an extradition treaty? Does this now imply that this is the rule, or does it merely imply a tacit norm. How is it possible to construe the difference? It would seem appropriate to argue that the particular circumstance would have to be viewed within the given context of the request. However, if a regime is to be based on a tacit understanding, as well as explicit rules, then there must be an accepted 'margin of error' in terms of compliance if we are to insure the survival of the regime.[132] Fritz Kratochwil demonstrates this point in terms of dispute resolution as 'no rule in itself can specify all possible ranges of application, disputes are bound to arise concerning "the meaning" of crucial terms or the relevant characterisation of a particular action.'[133] The focus invariably resorts back to a decision making process where judgements are based on actors mutual expectations. Rule guidance resorts to a system of 'unspoken rules' whose compliance is based on a perception of a common interest.

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[131] For example, Article 6 of the European Convention on Extradition, December 13, 1957, Eur. T.S. No. 24, 359 U.N.T.S. 276, provides '[i]f the requested party does not extradite its national, it shall at the request of the requesting party submit the case to its competent authorities in order that proceedings may be taken...' See also: The Inter-American Convention on Extradition, December 26, 1933, Article (2); United Nations Model Treaty on Extradition, G.A. Res. 45/116, U.N. Doc. A/Res/45/116, (1991). For articles pertaining to forms of co-operation in criminal matters see:

[132] See: Young, INTERNATIONAL REGIMES, pp. 342-46

[133] Kratochwil, RULES, p. 57.

3.4 International Agreements

Regimes provide for an explanation of co-operation in that they claim states obey the rules embodied within regimes because of the overall benefit provided. It is not the 'regime' specifically which remains the focus of importance in the international system, but rules and norms[134]. Rules expressly providing the basis for obligation. In the broader context of the legal system, it is the relationship between rules and international relations which exercise a compliance pull, founded on notions of mutual interest and co-operation. Specifically, law represents the acceptance of obligation based on the existence of these mutual interests. The basis for such obligation is found predominantly in international agreements, or treaties.

Within the general context, 'treaty' is the standard terminology covering most all forms of international arrangements and contractual agreements, such as those found in conventions, pacts, declarations, charters and protocols.[135] Treaties establish rules which are meant to be 'binding' upon States in both new and previously established areas of international law, and consistent with the Vienna Convention on the Law of Treaties.[136] Predicated on the basis of the Convention, qualifying attributes of a treaty

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[134] See discussion on the importance of norms, Ibid. pp. 16-17, and 23.

[135] For discussion see: Peter Malanczuk, ed., Akehurst's Modern Introduction to International Law, Seventh Revised Edition, (London: Routledge, 1997), pp. 36-39.

[136] The Vienna Convention on the Law of Treaties, codified 27 January 1980, applies to treaties made after the date of it's entry into force. Treaties are defined in terms of the Convention in Article 2(1)(a) as "treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.' *Vienna Convention on the Law of Treaties*, Chapter 7 in Ian Brownlie, Ed., Basic Documents in International Law, Third Edition, (Oxford: Clarendon Press, 1983), p. 351. For discussion on treaties see: Robert MacLean, ed., Public International Law Textbook, 16th Edition, (London: HLT Publications, 1994) Chapt. 13. See also: Linda A. Malone, International Law, (Larchmont, New York: Emanuel Law Outlines, Inc., 1995), pp. 4-28.

must meet certain criteria.[137] First, it should be a written instrument between two or more parties.[138] Second, those parties must be endowed with international personality.[139] Third, the agreement must be governed by international law,[140] and finally, it should be *intended to create legal obligation.*[141]

Treaties governing criminal conduct incorporate the term *aut dedere aut judicare*, which refers to the alternative obligation to extradite or place criminal offenders before (your own) judicial authorities, where the state may even ultimately decide that there is insufficient evidence to mount a prosecution. This is created as a safety measure, to ensure that the process of criminal law is not undermined by those who use borders as a means of asylum. In essence, it requires a state to either extradite a fugitive who has committed an international offence to be tried, or to retain them for the purpose of trial.[142] Extradition treaties seek to close the loophole by implying the obligation, that state's are treaty-bound to adopt either one or the other.[143]

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[137] MacLean, TEXTBOOK, p. 202.

[138] 'Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations', United Nations Charter, Chapter XVI. Miscellaneous Provisions, Article 102 (1) and (2); in Brownlie, DOCUMENTS, p. 31.

[139] Treaties are only concluded between recognised States, under customary international law as provided in Article 3 of the Vienna Convention, 'International agreements not within the scope of the present Convention', but does not preclude the binding force of such agreements. Article 6 of the Convention provides 'Every State possesses capacity to conclude treaties.' However, this does not preclude Federal States, or territories outside the scope of the Convention from treaty-making powers. See: Brownlie, DOCUMENTS, pp. 352-53; and MacLean, TEXTBOOK, p. 203.

[140] As per the International Law Commission Fourth Special Rapporteur, 1962, '...the Commission was clear that it ought to confine the notion of an 'international agreement' for the purpose of the law of treaties to one, the whole formation and execution of which (as well as the obligation to execute) is governed by international law.' MacLean, TEXTBOOK, p. 205.

[141] This provision is not included in the Vienna Convention, but follows provisions set out by the Law Commission Report. See, Ibid. pp. 205-6.

[142] Bassiouni and Wise, AUT DEDERE AUT JUDICARE, p. 3.

Historically, the idea is attributed to Grotius,[144] whose contention was all states have a duty to extradite or punish in all aspects where a state suffers injury, for ordinary crimes as well as international offences. This is symbolised by the maxim *aut dedere aut punire*, to extradite or punish, which is predicated in the natural law belief of states natural right to exact punishment. However, states *must* do either one or the other. This duty is attributed to the belief that all states have a common interest in suppressing crime. The assumption of a common social and moral imperatives which compel states to co-operate for the common good of society, or the hypothesis of *Civitas Maxima*.[145]

Reprehensible offences in the eyes of the international community on a whole, such as crimes involving international terrorism, represent a common concern to all states. A system of prosecution through an international criminal court, is not yet in place, but this is soon to change. The concept for an International Criminal Court is fast becoming a reality. The Rome conference in 1998, countries from around the world voted 120 to 7 to establish the first permanent standing court with power to prosecute war crimes, much like the recent events in Rwanda, Cambodia, and the former Yugoslavia.[146] The long term implications for such a court are many, and will be discussed further on in the study in Chapters Six and Eight.[147] However, the prospects such a court has for terrorism could eventually lead not only to a unified

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[143] It does not, however, give preference as to which one the state should consider. See: Ibid., at note 2.

[144] Hugo Grotius, De Jure Belli ac Pacis, Book II, chapter XXI.

[145] Bassiouni and Wise, AUT DEDERE AUT JUDICARE, pp. 22,28-30.

[146] John Goshko, 'U.S. Lobbies on War Crimes Court', *The Washington Post*, February 26, 1999.

[147] See Chapter 6.4.2; and Chapter 8.5.

definition of terrorism, but toward an international forum for trying terrorists; similar to the tribunal for the Lockerbie suspects examined in Chapter 1.[148] Until this time, however, the burden is placed upon states to uphold the law. Failure to extradite, or bring offenders to justice, only frustrates the system of public world order. With respect to the obligation of *civitas maxima*, it remains an imperfect obligation. Albeit explicit treaty agreements which tend to override the customary tacit understandings, have given way toward the acceptance of *aut dedere aut judicare* as a generally accepted norm. Still, the principle of *aut dedere aut judicare* must go beyond peremptory norms as problems of international terrorism remain of paramount importance to world order - or the concept of *jus cogens*.

Extradition as an obligation, relies not solely on customary practice of states, but on 'normative utterances' as well. In particular, what a state says as well as what it does.[149] What states regard as law becomes equally as important as the rules which guide their conduct. Speech, in this case, can only clarify such practices.[150] In this way, it is possible to reconcile 'treaty law' and 'rules of international law' in terms of what defines a generally accepted norm.

3.5 Compliance

This work is predicated on the notion that the world has become increasingly regulated. As such, sanction based models of co-operation are largely ineffective

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[148] Refer to case study in Chapter 1.1.2

[149] Akehurst, MODERN INTRODUCTION.

[150] Such as the distinction between *lex lata* and *lex ferenda*. 'A rule asserted to be law may not actually coincide with the behavior of states. This assertion may not even intended as a statement of existing law. Thus, a provision in a multilateral treaty does not necessarily represent current state practice. In the long run, such

methods of assessing international co-operation. If adherence to international law and political decision making are to be examined in terms of compliance, they must be done within the context of a decision making model. One that can examine levels of compliance among actors where obligation is assumed and adherence is unenforceable. Thus, the use of a managerial model, such as the one set forth by Abraham and Antonia Chayes,[151] is best suited for this use.

Co-operation within a rational choice model is largely treaty-centred, and provides the source of normative obligation within an international structure. Arguably, treaties are the basic components of the regime itself, and rely on agreements, either formal, customary or tacit, as part of their fundamental structure. Traditional debates have long centred on these agreements and the extent to which customary and tacit understandings have influenced legal obligation and constraint. Still, political arguments fall short of acknowledging that these agreements, or treaties, are founded on formal tenets of international law.

The effort to provide treaties with 'staying power', has traditionally relied on coercive power as a method of enforcement - or - sanctions. This method becomes inherently deficient in terms of cost, since sanctions are commonly economic or military, and prove anaemic in their ability to provide some form of change, thereby cost outweighing the benefit provided. Because sanctions are largely a 'response' to treaty violation, they are ill-planned, unreliable, and carry high political cost. Furthermore, there remains the notion of legitimacy. If only the weak are compelled

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statements become general international law only if accepted as binding in practice.' Bassiouni and Wise, AUT DEDERE AUT JUDICARE, p. 47.

[151] Further discussion is centered on the discussion and model asserted by Chayes & Chayes, as outlined in the first section *A Theory of Compliance* in Abram Chayes and Antonia Handler Chayes, The New Sovereignty,

to comply, then the system of enforcement invariably falls toward the legitimacy 'question'.

What becomes the necessary focus, is a model which relies on a general 'problem solving' approach as opposed to a sanction driven one. This is key, if the argument made is 'states follow rules even when it is not in their best interest to do so'. Compliance then, is the measure to which states have internalised international law and incorporated it within their decision making process. This is exercised through the communication actors share between each other, through either normative utterances or judicial rhetoric, but which follow the very tenets of a constructivist argument.

As a rule, states only follow the laws to which they have consented to. In order to understand why states do not comply to these agreements, it would follow only logically to understand why they do. As outlined by Chayes, three assumptions follow to this directive: efficiency, interests, and norms.[152]

The first, is an economic model, weighing the balance of 'cost' of non-compliance in governmental resource terms, with the 'benefit' of merely adhering to the treaty. In sum, it is cheaper to comply, than to deviate.

Treaties are a consensual agreement between parties. Presumably, actors enter into these agreements initially, with some degree of 'self-interest'. Before agreements are actually concluded there exists a negotiation period where actors are provided the opportunity to express their interests and define the parameters of the agreement. This is not to say, that all parties are in total agreement upon entering into a treaty, but

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Compliance With International Regulatory Agreements, (Cambridge, MA: Harvard University Press, 1995), pp. 1-28.

what exists is a representation of a broad spectrum of interests providing the basis for co-operation. Treaties are adaptable to these interests, even after they've been entered into force. They are *not* a static body of terms which appear unchanging to the inevitably changing system.

The assumption follows that treaties are to be obeyed, the very definition of the term *pacta sunt servanda*. However, it is just that - an assumption. It is a common understanding that the law is meant to be obeyed, that obligation is binding, that compliance is the outgrowth of this. Such behaviour is regarded as the universal norm. Norms guide behaviour, they create the basis for decision making analysis, it is in itself a 'reason for action'. Therefore, by observance of norms state's 'help define the methods and terms of the continuing international discourse in which states seek to justify their actions.'

It is not the states, however, which decide extradition, but generally the courts which make the decision. It is not correct to assume, and as evidenced in discussion in Chapter's One,[153] Five,[154] and Eight,[155] that courts especially in democratic countries, are controlled by the government. This simply is not the case. However, if for example an occurrence such as in the case of the *Achille Lauro*, which is discussed exclusively in Chapter 4,[156] the government were to bypass the courts, and render a decision, it would appear largely to the assessment of what the 'trade-off' for such a

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[152] Ibid., pp. 4-9.

[153] Refer to discussion of Extradition as a Process in Chapter 1.2.1

[154] Refer to the Hamadei case in Chapter 5.3.

[155] Refer to the four IRA cases in the discussion of Political offence in Chapter 8.2.1.

[156] See discussion under Importance of Cooperation in Chapter 4.4.1.

decision would be. In the case of the *Achille Lauro*, it was Italy's good relations with their Arab neighbours, which propelled the decision for 'non-compliance'. However, there remain circumstances where such lines are not as visible and it becomes necessary to delineate the difference between 'non-compliance' and 'incomplete compliance'. Chayes examines three such instances; ambiguity, limitations on state capacity, and temporal dimensions.[157] While all are relevant to the issue of non-compliance, the most relevant of the three to this particular study, is the issue of ambiguity.

By design, most treaties are not specific in terms range of dispute. The flaw is not in the actual design, but in terminology since it is virtually impossible to draft a treaty which covers all ranges of possibility within every given context of a situation. Specific formulas for this would be incalculable. Instead, there exists a range of interpretation within a given area where states adopt it's meaning. This is not to ignore the possibility that states use ambiguity to their advantage. Often working within the 'parameters of ambiguity' falls to greater advantage, as opposed to following the 'letter of the law' which may prove to be more restrictive. But it is 'language' nevertheless, which becomes the focus.

Is there, then a way of measuring the degree of compliance? Compliance is by nature unquantifiable, therefore a scientific approach is virtually impossible. However, there are 'acceptable limits' of compliance which are in fact determinable. In order for this to be achieved, it must be an ongoing process, with changing parameters which react to the perspectives and interests of the international system.

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[157] Chayes, SOVEREIGNTY, pp. 10-17.

Compliance must be a 'sophisticated strategy'[158] which entails all aspects and ranges of possibility within the players which comprise a system. It must be a managerial model, which draws it's actors into a 'web-like' model where compliance is advantageous, not only then for the state, but the overall system.

3.6 Conclusions

The research design inherent in this framework argues against traditional realist notions of law and politics and the international system as a power model. Instead it defines a structure which is based on an interwoven process between two disciplines founded in tenets of social theory, defined by norms, and analysed by decision making in the *context in which it occurs*. This path of reasoning is intended to lead into empirical investigation which will provide the means by which prescriptive action can take place.

What is to be gleaned from this strategy is that there is a difference between rules and law, and for the purpose of this study, the distinction is made between these legal rules and the *process* by which they are employed. Law, as defined by this study, is a continuing process of authoritative decisions, not the mechanistic application of rules. That law is a choice process, grounded in the use of norms characterized by principle, and executed through a reasoning process. That norms matter in this reasoning process, and play a significant role in shaping decisions. Norms reduce the complexity of choice by acting as guidance devices *for* choice, but depend largely on context to do so. Such reasoning cannot be examined through traditional classical

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[158] Ibid. pp. 22-28

models, but a more practical one, which accounts for the change in discource of legal argumentation. This is important if it is to account for normative influences on decision making, which is prevalent in this study.

This method is grounded in a belief system of rational choice, and employed through the use of a regime-based or 'constructivist' approach. The usefulness of this approach is based on the ability for the examination of norms to be separate from the traditional assumptions imposed by rational choice models. Regime change, and regime strength, then, may be determined through a change in the normative components toward a given issue; or, the inconsistent observation of these norms, which in turn weaken the regime. In sum, a rational choice model, with a level of variance towards rules, norms, principles and compliance.

Extradition provides rich illustration for such a model. Extradition is a legal concept, realised historically through tenets of traditional legal thought. It is an international agreement, carried out through a process of domestic legislation, it's success contingent upon state's perception of international obligation and legitimacy. However, 'rules' governing the extradition 'process' are not exacted through any one system, since they are executed by a situation specific decision making process. Compliance to extradition then, can only be measured in terms of the states and the system in which it affects.

This becomes especially poignant in the case of international terrorism. The directive of *aut dedere aut judicare* inherent in treaty terminology, creates the basis of obligation for states to comply. As history has shown, this is not always the case. For extradition to become an effective deterrent against terrorism, depends on it's success. An examination of extradition's success or failure, lies in the analysis of the decision

making process, which under traditional models, falls under notions of self-interest, sovereignty, and jurisdiction. Given all these factors *are in fact* a part of extradition's failure to succeed in terrorism cases, they are not the *only* reason, and should not provide the sole focal point for investigation. Other factors play a part as well; the challenge of political offence, the impact of the courts, and the alternative options in lieu of extradition, are all participating factors. In sum, what is required is an empirical investigation of these factors which influence the choice by which extradition takes place, and which will lead toward a clearer understanding of effectiveness of extradition as a tool against international terrorism.

Chapter Four

The Achille Lauro: International Co-operation in Punishing Terrorists

> *'The events of the past 24 hours reinforce the determination of all those who share the privileges of freedom and liberty to join together in countering the scourge of international terrorism....[t]hese young Americans sent a message to terrorists everywhere, a message, "You can run but you can't hide."*[1]

4.1 Introduction

Prior to the events of the *Achille Lauro*, the U.S. administration had struggled in their response to terrorism. Previous events targeting American citizens had left a zealous U.S. administration committed to fighting terrorism, almost impotent in their ability to thwart attacks against their own citizens on foreign soil. The *Achille Lauro* changed this. It signified a crucial turning point for the Reagan administration, and appeared to strengthen U.S. resolve to fight terrorism. It also showed exactly how far the U.S. was willing to go to accomplish this, even if it meant a response which tugged at the constraints of international law. For the United States, *Achille Lauro* signified a needed victory against terrorism, which had plagued the current administration from the very beginning.

Reagan had entered office in the midst of a hostage crisis, which followed on the heels of the previous Carter administration's failed attempt at a hostage-rescue, embarrassing an ill-prepared U.S. military.[2] When Reagan took office, fighting terrorism was a priority for his administration. Yet, from the early part of his term in office, nearly a half dozen terrorist attacks occurred on U.S. citizens. By the time

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[1] Transcript of White House News Conference on the Hijacking, *New York Times*, October 12, 1985.

[2] Stansfield Turner, Terrorism and Democracy, (Boston: Houghton Mifflin Company, 1991), pp. 79-81.

Reagan left office at the end of his tenure in 1989, he left behind a less than spectacular record in dealing with terrorism. Over 550 Americans had been killed in terrorist attacks, fifty-seven Americans had been held hostage in Beirut, six were still there when he left office, and an embarrassing 'arms for hostages' deal with Iran had damaged our international credibility.[3] Still, the impression was that Reagan had a 'good reputation' in fighting terrorism.[4] This was largely due to the forceful, and sometimes cavalier attitude Reagan took in his approach. This was especially evident in the *Achille Lauro*.

The truth is, the *Achille Lauro* was not a real victory. The mastermind of the operation was never apprehended or punished. The U.S. never got their 'day in court'. And, in the meantime the U.S. had managed to infuriate and embarrass two very valuable allies.[5] Regardless of the dramatic military attempt to apprehend the terrorists; irrespective of the patriotic rhetoric which followed it; and despite all attempts to appear victorious; the case winds down to an extradition request and compliance to international law. It was dependent on co-operation which was interrupted by a clash of priorities on behalf of the players involved.

The *Achille Lauro* is significant because it demonstrates three things. First, from the tangle of events, it does provide some insight as to how states choose between alternatives, and the justification they present for their actions. From this decision making process, two things become aparant: the prospects for international co-operation, and the level of compliance to international law.

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[3] Ibid. p. 224.

[4] *International Terrorism*, Foreign Affairs, Council on Foreign Relations, 1986, pp. 611

Second, from the Achille Lauro arise some very important questions about states policy, especially in dealing with terrorism. How states respond and how that reconciles with international law, are very much a part of the personality of the state. This is an area which will be re-addressed in other cases throughout the study as well, but which builds on the events of the *Achille Lauro*.

Finally, the *Achille Lauro* makes a rather bold statement on the prevention and punishment of terrorists. This is one instance when actions lived up to rhetoric, and while not an entirely successful outcome, it still provides a strong, and somewhat controversial, alternative in preventing and punishing terrorism. This is another area which will be explored throughout the study as well, but is very prominent in this particular case.

While it is well established that this is a study on extradition, and it's effectiveness in dealing with international terrorism, that is not the only area which is explored here. The difficult thing about the *Achille Lauro*, is that it's not just a pure extradition case. Many components overlap creating a web of events which affect decision making, and ultimately affect compliance. The purpose of using this particular case study is to demonstrate the possibilities for international co-operation toward the capture and punishment of international terrorists. Extradition is an integral part of this. What makes the *Achille Lauro* interesting is how the sequence of events affects the prospects for co-operation, and the limits of unilateral action when dealing with international terrorist.

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[5] James Buxton and Tony Walker, 'Achille Lauro affair sours relations for three nations', *The Times*, October 14, 1985.

The first part of this chapter will discuss the prospects for international co-operation with regard to terrorism on a broad scale, and how international law has responded to meet this challenge. This also includes a discussion on jurisdiction, a relevant, and applicable aspect of international co-operation. The purpose is to provide a suitable backdrop by which to apply the case study.

The second part will examine the *Achille Lauro* case - the problems it presents to the punishment of terrorists, how this hinders international law, and the measures states are willing to take to protect their own citizens. Also, it provides some insight to the political workings behind states decision making and how this in turn effects international co-operation.

The third part, provides an in-depth analysis to the legal mechanisms which were already in place to respond to exactly this type of incident. These legal mechanisms are meant to be the instruments by which international co-operation takes place. When they are 'mis-interpreted', or worse, ignored - then it undermines their capacity to help to bring terrorists to justice.

This chapter seeks not only to provide an integrated discussion by which compliance to international law is tested, but to establish certain principles which lay much of the groundwork for the following chapters. For the *Achille Lauro* not only provides a new plateau for state's response - but leaves a clear indicator in the evolution of the extradition regime.

4.2 Prospects for International Co-Operation

While the international community appears to acknowledge the importance of co-operation against terrorist offences, sensitivity toward the political implications on the

issue of terrorism, have a tendency to provide for just the opposite.[6] Yet without the prospect of international co-operation, there would be very little to talk about in terms of how the problem of terrorism is to be addressed internationally, regardless of whether rhetoric falls short of practical expectations.

The history of international co-operation, against terrorism through multilateral agreements begins with the 1937 League of Nations agreement on the Convention for the Suppression of Terrorism, calling for the establishment of a world criminal court. Despite early international efforts brought to bear on the problem of terrorism, the issue was not addressed as a part of an agenda until 1972, after the Black September organisation launched an attack on Israeli athletes at the Olympic games in Munich, when the issue of terrorism was brought to the world stage. However, subsequent efforts to address the problem on an international level, were fruitless in their attempts to produce a working definition of terrorism.[7] The issue was, and still is to some extent, whether or not acts of terrorism can be considered as separate from its causes. Since in many cases the professed motivation for political violence, or terrorism, is political oppression, then it is probably illogical to think of terrorism and its causes as two separate issues. However, as the threat of terrorism increased and became more prevalent, pressure mounted to deal with terrorism as a crime and not as part of an ambiguous problem.

The international community's response was mounted in the form of counter terrorist conventions establishing a framework for international co-operation among

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[6] Martha Crenshaw, *Terrorism and International Co-operation*, a paper prepared for the Institute for East-West Security Studies, pp. 21-22.

[7] The Americans took initiative with the Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, and was rejected by the international community.

states. These conventions don't prohibit 'terrorism' per se, but specific acts which are collectively deemed by the international community as criminal offences. Acts against civil aviation[8] or internationally protected persons[9], or against hostage taking,[10] manage to delineate the specific criminal act from terrorism on whole.[11] These agreements require states to extradite alleged offenders, or submit their cases to appropriate authorities for prosecution. Their intent is to promote greater co-operation through the apprehension, prosecution, and punishment of terrorists, but more often than not, fall short in their implementation. Part of the difficulty, is in trying to get a significant number of actors to agree on a specific point of issue. As Martha Crenshaw notes; "[g]iven the universal scope of the U.N. treaties, as well as the controversaility of terrorism, it is not surprising that international treaties are often ineffective because of undersubscription and reluctant implementation."[12] John F. Murphy supports this notion when he acknowledged in his 1986 law review publication noting: "[t]he effectiveness of these global conventions as anti terrorist measures is questionable. Even if fully implemented, the limited and piecemeal

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[8] The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 974 U.N.T.S. 177, International Legal Materials 1151. (The Montreal Convention)

[9] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, December 14, 1973. 1035 U.N.T.S. 167, 13 International Legal Materials 41 (1974). (The New York Convention)

[10] International Convention Against the Taking of Hostages, December 17, 1979, G.A. Res. 34/146, U.N. G.A.O.R. Supp. (No. 46), at 245, U.N. Doc. A/34/46 (1980), International Legal Materials 1456 (1979). (The Hostages Convention)

[11] Thomas M. Franck, The Power of Legitimacy Among Nations, (Oxford: Oxford University Press, 1990), pp. 69-71.

[12] Crenshaw, CO-OPERATION, p. 24.

solutions of these conventions would be of little use in combating the many manifestations of terrorism."[13]

One of the causes for this may be that United Nations conventions against terrorism have largely presented themselves as an ad hoc by-product of crisis - not as a pre-empetory measure. As a result, it leaves reasonable doubt as to the strength of the international community's resolve against terrorism. Especially when political will and national sovereignty, in many cases, undermine their promissory obligation when these measures are relied upon. Traditionally, and historically, international co-operation through legal means has proven to be 'perverse' in it's inability to agree, and exhibits more of a lack of consensus rather than forward progress toward tighter unity against terrorism.[14] As Professor Paul Wilkinson pointedly notes: "[t]he United Nations has proved a broken reed on the whole subject of terrorism. It has proved as useless in countering terrorism as the League of Nations before it."[15]

The outgrowth of the greater 'institutional' inadequacies, was the creation of smaller, separate, models on a regional basis. The Organisation of American States, for example, reacted by establishing an act protecting diplomatic persons.[16] The

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[13] John F. Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, Columbia Journal of Transnational Law, vol. 35, 1986, p. 44.

[14] Judge Abraham Soafer, *Terrorism and the Law*, Foreign Affairs, vol. 64, (1986), pp. 901-922.

[15] Paul Wilkinson, Terrorism and the Liberal State, (London: MacMillian, 1979), p. 284. While historically this is valid, since the 1990's there has been a significant change in UN response to terrorism, such as for example, through the use of UN peacekeeping missions and humanitarian intervention. See: Paul Wilkinson, Terrorism Versus Democracy, (London: Frank Cass, 2000), pg. 89.

[16] The 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International Significance. This was superseded by the 1973 United Nations Convention on Protected Persons.

Council of Europe[17] and the European communities established several regional agreements in an attempt to suppress terrorism and restrict the use of political offence, but this effort was largely unsatisfactory since states were slow to ratify these measures, and have a poor record in enforcing them.

As a result, networks of less formal co-operation have been the method that states ultimately resort to. Diplomatic co-ordination, or diplomatic exchanges for example, at summits or various high-level meetings. While meetings or summits are not binding under international law, and neither are the statements which result from them, they provide an unstructured forum by which to exchange views among state leaders, thereby creating meaningful co-operation. This method has trickled down to the lower levels as well. Networks of informal government operate on a more local level; Europe's "Trevi" system for example, links various Ministries of Justice and includes measures which pools information thereby improving communication amongst European police forces. The General Assembly of the International Criminal Police Organisation, or Interpol, is another example of linkage among police forces. Recently, all 178 members have committed themselves to more sharing of information specifically relating to terrorism.[18]

Bilateral co-operation also provides a strong alternative when dealing with terrorism. Through the use of treaties in areas such as extradition and mutual assistance, or even through ad hoc bilateral assistance, states can extract a significant amount of co-operation. Treaties have been particularly helpful in the area of aviation

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[17] The 1997 European Convention on the Suppression of Terrorism and the Dublin Agreement which applies the convention to all member states of Western Europe.

[18] See: Interpol Website at: http://members.tripod.com/icpo-vad/icpo-inf.html

security, for example, such as in the early 1970's when aircraft hijacking from the United States to Cuba was especially abundant.[19] The US and Cuba signed a Memorandum of Understanding, which would allow for the return of the hijacked aircraft and the extradition or prosecution of the hijackers. This was an exceptional, considering the vast political differences between the two countries, but provided a clear example of how a distinctive action can be mutually objectionable, even to states with opposing ideologies. While it is significantly easier to address problems such as co-operation with terrorism through bilateral avenues, and even less strenuous when dealing with like-minded states who share similar attitudes toward terrorism. It still remains a profound achievement within the international community to bring to the table those countries who don't think alike, or whose attitudes differ regarding terrorism, especially when such countries could potentially provide aid to terrorist organisations, or provide sanctuary for a terrorist. It becomes an even more poignant mark of achievement when these states can be convinced to join in such collective measures.

The bottom line is that co-operation is necessary, not only to create a unified interest, but to agree on basic standards of behaviour that states expect from each other. This is especially true in cases of international terrorism. International law on its own cannot and does not create international order, but the execution of it does. This should not be interpreted as international co-operation being dependent on the institutional constraints law presents either, but it does depend largely to some degree on the behavioural norms these constraints facilitate. Having said that, co-operation

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[19] Robert Holden, *The Contagiousness of Aircraft Hijacking*, Indiana University, http://pegasus.cc.ucf.edu/~surette/hijacking.html

also means that to some degree situations will arise where states must be willing to alter their stance for the benefit of other states. This is usually easier said than done. There must be incentive. There must be pre-determined guidelines for co-operation, and there must be no doubt that the penalty for non-co-operation will be considerably outweigh the costs of co-operation. In short, there must exist a good reason to want to play ball. While terrorism may seem as good a reason as any, there are several recurrent difficulties: first, the limitations the degree to which a state is willing to co-operate. And second, how far requesting states attempt to pursue broad claims of power, or jurisdiction. As will be discussed, these were both factors which severely hindered the successful outcome of the *Achille Lauro* case.

4.3 Jurisdiction

> *'Jurisdiction cannot be about sovereignty for its own sake; and nor is international law value-free.'*[20]

Most friendly nations are usually willing to co-operate by providing evidence or extraditing suspects providing the applicable statutes are in place; and, if the extra-territorial jurisdiction of a requesting state does not reach beyond the limitations imposed by international law. This in and of itself, however, is often a matter of great controversy. Recall for example, the case identified in Chapter 1 regarding the capture of Fawaz Yunis by U.S. Agents from a luxury yacht in international waters,[21] and which will be addressed again in this chapter. Often U.S. efforts to exert

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[20] Roslyn Higgins, *The Legal Basis of Jurisdiction*, in Cecil J. Olmstead, ed., Extra-Territorial Application of Laws and Responses Thereto, (Exeter: Short Run Press, 1984), p. 14, hereinafter BASIS

[21] See: Chapter 1.2.3 Alternative Methods of Rendition other than Extradition, on p. 20.

extraterritorial jurisdiction have often confronted deep resentment and hostility from requested states. This will be examined further on in case studies in Chapters 7 and 8.

Nevertheless, customary international law provides several basis of jurisdiction on which states can apply their laws: territorial jurisdiction, nationality jurisdiction, protective jurisdiction, passive personality jurisdiction, and universal jurisdiction.[22] The concept of jurisdiction remains one of critical importance in international law, since it performs the function of 'allocating competence'. Or, as Justice Rosalyn Higgins recognises: '[t]here is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances. Without that allocation of competences, all is rancour and chaos.'[23]

4.3.1 Universal Principle

Under universal jurisdiction, international law allows for the exercise of jurisdiction as it applies to certain types of offences within the international community. This means that, a state is permitted to apply its laws even if the act occurs outside its own territory, even if the offender is a non-national, and regardless of whether nationals were harmed by the criminal act.[24] While very few cases can actually be argued on this principle - meant to be applied only to those cases which present themselves as an attack upon international order - it exercises jurisdiction born

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[22] See also: Patrick L. Donnelly, Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986, 72 Cornell Law Review, March, 1987.

[23] Roslyn Higgins, Problems and Process International Law and How We Use It, (Oxford: Oxford University Press, 1994), p. 56.

from universal treaties or acceptance under general international law.[25] Piracy, slavery, torture, genocide, war crimes, are all examples of how or when universal jurisdiction might apply. The International Military Tribunal at Nuremburg, or the United Nations Tribunal to Adjudicate War Crimes in the Former Yugoslavia, are both cases where jurisdiction was seized as a result of violations of conventional laws relating to hostilities. Terrorism, however, would not necessarily be considered as 'universal'. It is clear that the Montreal,[26] Tokyo,[27] Hague,[28] and Hostage Conventions[29] all lay the groundwork for jurisdiction by incorporating the principle *aut dedere aut judicare* establishing jurisdiction by every single signatory nation over both the offence and the offender. But jurisdiction is not 'universal' in the strictest sense, since these Conventions only cover specific crimes. As Rosalyn Higgins argues: "[a]ll that is 'universal' is the requirement that all states parties do whatever is necessary to be able to exercise jurisdiction *should the relatively limited bases* of jurisdiction arise in the circumstances...this is not treaty-based universal jurisdiction."[30]

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[24] The Draft Convention on Research in International Law of the Harvard Law School, Jurisdiction with Respect to Crime, 29 American Journal of International Law, Supp. 1935, p. 573 , Herinafter, HARVARD RESEARCH. Ibid. pp. 56-57.

[25] Ibid. p. 58.

[26] Ibid, note 8.

[27] Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), September 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

[28] Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), December 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

[29] Ibid note 10.

[30] Higgins, LAWS AND RESPONSES. p. 64.

The classic example of universal jurisdiction is the Aldoph Eichmann case discussed earlier in Chapter 1. The Israeli Mossad abducted Eichmann from Argentina and brought him to Israel for trial[31] under a 1950 Israeli statue enacted to punish "crimes against the Jewish people" and "crimes against humanity"[32] committed during World War II, part of Hitler's 'final solution' campaign. Even though Israel as a state was not yet in existence. There was much protest as to the *method* by which Eichmann was brought to Israel for trial, but no objections were raised as to the *right* to do so. There existed a clear understanding under international law, of the universal jurisdiction to try and punish crimes against humanity.

4.3.2 Territorial Principle

One of the attributes of sovereignty is that states can prescribe the laws which apply to persons within their own territory.[33] As one of the most basic principles of international law, this is relatively unchallenged. It remains the key starting point for criminal legislation. Arguably the very direction for penal law is 'towards the safety and social equilibrium of those who agree to place themselves and remain under the protection of a given sovereign.'[34]

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[31] U.N. Doc. S/4336 (1960)

[32] Louis Henkin, How Nations Behave Law and Foreign Policy, (New York: Columbia University Press, 1979), p. 270 and at note 5.

[33] HARVARD RESEARCH, p. 480. BASIS, p.5; Kegel and Seidl-Hohenveldern, *On the Territoriality Principle in Public International Law*, Hastings International and Comparative Law Review, vol. 5, no. 245, Peter Malanczuk, ed., Akehurst's Modern Introduction to International Law, Seventh Revised Edition, (London: Routledge Press), pp. 110-116, hereinafter LAW.

[34] Bart DeSchutter, *Problems of Jurisdiction in the International Control and Repression of Terrorism*, in M. Cherif Bassiouni, International Terrorism and Political Crimes, (Springfield: Charles C. Thomas Press, 1975), pp. 381.

When a crime is committed, states may claim jurisdiction over the offence within its territory, even if the offender is a non-national. This extension of jurisdiction over non-nationals, suggests a deviation in the exclusive nature of territorial jurisdiction. It has been previously argued elsewhere,[35] that nations have always possessed sole jurisdiction within their own territory. The exception being that nations also possess the right to bind their own nationals when they are in another states, or the 'nationality principle'.[36] Extension of such jurisdiction suggests a component which lacks territorial character, this is not necessarily the case. States may only prescribe law within their own territory and cannot hold accountable those who reside outside its borders. The ability to impose laws to those living outside is unlikely, as is the ability to enforce.[37] Territoriality, therefore, retains its character.[38]

4.3.3 Passive Personality

The passive personality principle permits a country to exercise jurisdiction over an act committed by an individual outside its territory, because the offence harmed a national of the state claiming jurisdiction.[39] It is based on the duty of a state to protect its nationals abroad.[40] Under the passive personality principle, the state asserting

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[35] See: Francis Mann, *The Doctrine of Jurisdiction in International Law*, Recueil des cours, (1964), p. 93

[36] Under the nationality principle, '[a] state may prosecute its nationals for crimes committed anywhere in the world.'; Akehurst, LAW, p. 111.

[37] Higgins, BASIS, pp. 7-8.

[38] Ibid.

[39] HARVARD RESEARCH, pp. 573-77.

[40] See: The *Lotus* Case, Lord Finlay's dissenting opinion:
"The passing of such laws to affect aliens is defended on the ground that they are necessary for the 'protection' of the national. Every country has the right and the duty to protect its nationals when out of their own country. If

jurisdiction is more concerned with the effect of the crime, than where it occurs.[41] Subsequently, this makes it the most controversial as to whether or not it asserts a valid basis of jurisdiction under international law.

The precedent setting case for this principle is The*Lotus*[42] Case, when in August of 1926, the Turkish vessel *Boz-Kourt* and French vessel *Lotus* collided on the high seas[43]. This resulted in the sinking of the Turkish vessel, and loss of life for eight members of the Turkish crew.[44] When the *Lotus* sailed into port in Constantinople, the captain was arrested, charged, and convicted of manslaughter.[45] France protested the Turkish assertion of jurisdiction to the Permanent Court of International Justice,[46] which found in favour of Turkey.[47] The collision and it's subsequent effect on the Turkish vessel, was likened to an effect on Turkish territory.[48]

Two caveats to this. First, ships, like embassies, are not national territory. By 'likening' the collision to national territory, tends to blur jurisdictional intentions. Second, the event occurred on the high seas - not within the territory of another.

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crimes are committed against them when abroad, it may insist on the offender being brought to justice." The *Lotus* Case P.C.I.J. Series A. no. 10 (1927)

[41] This principle is also known as the 'effects doctrine'. For case precedent see: United States v. Aluminium Company of America (2nd Cir. 1945). The second circuit court held that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." See also: Christopher Blakesley, *Jurisdiction as Legal Protection Against Terrorism*, 19 Connecticut Law Review 895-926, 1987.

[42] PCIJ, series A, no. 10 (1927)

[43] Ibid.

[44] Ibid.

[45] This occurred on September 15, 1926. Ibid.

[46] Ibid.

[47] Actually, out of the 12 judges, six found in favour of Turkey, and six found in favour of France. It was the President of the Court who cast the tie breaking vote (pursuant to rules of a tied vote in the ICJ). Ibid.

[48] Ibid.

Therefore, while *Lotus* is considered the benchmark case for passive personality - it is not a *true* test for passive personality.[49]

Where this was relied upon again in recent application, was against the backdrop of a terrorism case, which is different from an ordinary 'torts' case or 'criminal' case.[50] In *United States v. Yunis*,[51] which was the case mentioned in Chapter 1 and earlier in this section, involving the U.S. prosecution of a Lebanese national for his involvement in the hijacking of a Jordanian airliner in the Middle East in June, 1985;[52] the U.S. based it's jurisdiction on the passive personality principle, the only connection being the presence of U.S. nationals aboard the flight.[53] This was accepted by the courts on the basis of the passive personality jurisdiction under international law,[54] but it is again important to note that other states did not accept the legality of the means by which the U.S. exercised its extraterritorial jurisdiction in this case.

In a similar case, although never a jurisdictional issue before the courts, but which clearly relied upon the passive personality principle, was the U.S. based claim for an extradition request in the *Achille Lauro* hijacking - where a U.S. national was murdered during a hijacking of the Italian cruise liner off the Egyptian coast.[55] The

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[49] Higgins, PROCESS, p. 66

[50] See: Restatement (Third) of the Foreign Relations Law of the United States §402, comment g, which states: "[t]he principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organised attacks on a state's national by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials."

[51] 681 F. Supp. 896 (D.D.C. 1988), appeal docketed, No. 89-3208 (D.C. Cir. November 30, 1989).

[52] *Yunis*, 681 F. Supp. at 899.

[53] Ibid.

[54] Ibid.

[55] See: Briefing by National Security Advisor Robert McFarlane on the Apprehension of the *Achille Lauro* Hijackers, October 11, 1985.

U.S. argued that based on the passive personality principle, they maintain the right to extradite the offenders to the United States to stand trial.[56] Although Italy refused the extradition request, it is clear that U.S. actions are illustrative of U.S. acceptance of the passive personality principle.[57] This is a significant point as it became part of how the U.S. policy would respond to terrorism.

4.4 The Achille Lauro Case

When terrorists use foreign territory to target American citizens, response options are severely limited. The United States has no authority to make arrests or conduct investigations; as such behaviour is prohibited under international law. Yet there arguably exists no greater motivation, to any U.S. administration, than to capture and punish those who have committed terrorist offences against U.S. citizens, and who continue to elude justice. As Philip Heymann acknowledges:

> *"The trial of a terrorist must bring four things together in one place: an applicable statutory prohibition, a willingness to prosecute, the necessary evidence, and the suspect. Terrorists can use the advantages of borders and easy transportation to assure that neither they (who may have fled to a safe location) nor the evidence (which may be outside the United States) are within the United States, the only jurisdiction with great enthusiasm for undertaking the risks of prosecuting acts by terrorists against American citizens."*[58]

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[56] Ibid.

[57] The Achille Lauro affair was also referenced in U.S. v. Yunis , with regard to the passive personality principle. 681 F. Supp. 896, 900-03 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. November 30, 1989). Following the Achille Lauro affair, the International Maritime Organisation adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, March 10, 1988. This convention allows jurisdiction over unlawful acts at sea, based on the floating territory, territoriality, nationality, protective, and passive personality theories. See also: John G. McCarthy, *The Passive Personality Principle and Its Use In Combating International Terrorism*, 13 Fordham International Law Journal, (1990), pp. 298-327, and at note 81.

[58] Philip B. Heyman, Terrorism and America A Commonsense Strategy for a Democratic Society, (Cambridge, Massachusetts: MIT Press, 1998), p. 47. Herinafter, COMMONSENSE.

The *Achille Lauro* demonstrates the many problems terrorism poses when terrorist organisations use foreign territory for its operations, and how this hinders law enforcement. It introduces as well, the problems of prevention and the measures states, in this case, the United States, are willing to take to protect their citizens abroad. Also, it magnifies the difficulty in the arrest, trial, and punishment of those who commit these acts, which largely depends on international co-operation. When this hand is forced, and measures are implemented through the use of force or through military measures, which are expressly prohibited by international law, such actions have consequences. And such consequences will affect the international community on balance, and possible future prospects for co-operation. While this was certainly the case in the *Achille Lauro*, this is also a larger topic which will be the focus of study later on in the work.

Finally, the *Achille Lauro* highlights what is often overlooked - the challenge terrorism and law enforcement present to intelligence. The opportunities for intelligence gathering and the rules which govern them, become severely limited when the information sought lies abroad. Success for the capture and punishment of terrorists often depend on international co-operation with respect to intelligence - equally if not greater than co-operation in the realm of international law.

On October 7, 1985, a radio station in Gottenberg, Sweden picked up an emergency transmission from the captain of the Italian cruise liner, the *Achille Lauro*, claiming the ship carrying some 400 passengers, had been hijacked off the coast of Egypt.[59] The hijackers, who identified themselves as members of the Palestinian

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[59] For detailed reporting on the incident see: John Walcott, Rod Nordland, Theodore Stanger, Milan J. Kubic, Andrews Nagorski, John Barry and Susan Agrest, Special Report: 'Getting Even', *Newsweek*, October 21, 1985, pp. 20-32.

Liberation Front (PLF),[60] demanded the release of 50 Palestinian prisoners held by Israel.[61] Otherwise, they would execute the passengers starting with the Americans.[62]

This was not the first incident of its kind to the Reagan administration. A few months earlier, Palestinian terrorists hijacked TWA flight 847 in Greece and held passengers hostage in Beirut. During the incident, an American Navy diver was murdered, and the hijackers managed to escape.

Following the 1985 TWA 847 incident, the Reagan administration established a task force to study U.S. response to terrorism.[63] The task force, spearheaded by then Vice President George Bush, incorporated representatives from the FBI, CIA, State, Defense, and Transportation departments, was designed to 'expose and correct' weaknesses inherent in existing response measures, and hasten to realise the administrations 'swift and effective retribution' policy.[64] Part of the task force directive outlined a framework to deal specifically with terrorist threat, and which

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[60] The PLF is a splinter faction of the Palestinian Liberation Organisation, and was one of the nine organisations which comprised the Palestinian resistance.

[61] One of the prisoners included here was Samir Al-Qunaytiri, one of four Palestinians who carried out a raid on Nahariyyah, a town on the northern coast of Israel in April 1979. Al-Qunaytiri captured and murdered Dani Haan and his 5 year old daughter while his wife and newborn daughter - whom was accidentally suffocated by covering her mouth to quite her crying - hid in a back room. Two of the four Palestinians were shot and killed by Israeli soldiers, the other two were imprisoned. One was released in a previous prisoner exchange carried out between Israel and the Palestinians - the remaining prisoner, was Al-Qunaytiri, "the butcher of Nahariyyah". See: 'Hijackers Demands Outlined', FIBIS, October 8, 1985. See Also: Christopher Dickey, 'Italian Cruise Ship Seized off Egypt With 450 Aboard, Release of 50 Palestinians Asked; 28 Americans Cited As Passengers' *The Washington Post*, October 8, 1985

[62] 'Hijackers Threaten To Kill Passengers' translated from the *Beirut Domestic Service*, *FBIS*, 8 October 1985.

[63] The Task force was an offshoot of the Terrorist Incident Working Group (TIWG) - a government committee formed in 1983 - which was consequently unsuccessful. See: Oliver L. North, Under Fire, An American Story,(New York: Harper Collins Publishers), 1991, p. 197. All citations hereinafter which make reference to this work were confirmed by telephone interview with Col. North, October 14, 1997.

[64] Marc A. Celmer, Terrorism, U.S. Strategy, and Reagan Policies, (Washington D.C.: Mansell Publishing Limited), 1987, p. 25. See also: Edward A. Lynch, International *Terrorism: The Search for a Policy*, Terrorism: An International Journal, vol. 9, no. 1, 1987.

provided a mandate to co-ordinate government response - 'pre-emptively if possible, reactivity if necessary'.[65] This did not discount the use of military force.[66]

The U.S. Interagency crisis team was the Operational Sub-Group (OSG) under the National Security Council (NSC) and was headed by the deputy director of the NSC staff, Vice Admiral John M. Poindexter. The OSG would then make recommendations through the national security advisor, Robert McFarlane, to President Reagan. Under them, the Department of Defense Joint Special Operations Command had a specially trained, highly developed hostage rescue team - this was the division at the ready when the news of the *Achille Lauro* broke - and it was this hostage rescue team, along with a Navy SEAL team which were flown to Sicily under the command of General Carl Stiner, when the incident concluded.

These teams were created with one goal in mind - that the U.S. was not going to appear weak in dealing with terrorists. Previous incidents, the Iranian hostage crisis,[67] the Marine barracks bombing,[68] the Berlin Discotheque,[69] TWA 847,[70] were not just attacks on American citizens, but on American political pride as well. There was a strong amount of determination born from this, and US policy became 'non-negotiable' when having to confront incidents of terrorism against Americans, even if

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[65] North, UNDER FIRE.

[66] Ibid.

[67] November 4, 1979 when guerrillas seized the U.S. embassy in Theran and held its inhabitants hostage for 444 days.

[68] October 23, 1983 when a truck filled with explosives crashed the gate of the Marine barracks in Lebanon killing 241 U.S. Marines.

[69] La Belle Discoteque bombed in 1986 killing U.S. 2 soldiers and injuring several off-duty GI's. See: Terrorism Research Center, http://www.trc.com

[70] June 14, 1985 hijacking of TWA flight 847 and the murder of Navy diver Robert Stetham.

it entailed a military option. Which was the strongly favoured choice by the United States in the case of the *Achille Lauro*.

The Italian government, under Prime Minister Bettino Craxi, had reacted to the incident by organising itself as well, though with different priorities. The Italians, whose foreign policy entails close ties with both the Arab states and the PLO, were more heavily intent on negotiation. Italy's motivation was simple - solve the crisis and protect its citizens aboard the *Achille Lauro*, without instigating future retaliatory attacks against Italy or its citizens.

Unlike the US administration, Italy had no hard and fast plans for an attack of this type - in fact, the hijacking had caught them entirely by surprise. The Craxi government was relatively unprepared in terms of 'doctrine' on how to handle an international event sparked by a terrorist incident. There was reason for this, Italy had never really been threatened or been made a 'target' by Arab states.

The Italian strategy was two-fold. First was to maintain open and constant contact with all the parties involved to insure that there were no missed opportunities. Second, was to prevent the Americans from using force through the use of diplomatic and legal argument. The liner was of Italian registry, and technically under the jurisdiction of Italy, which was fine as long as the situation was contained on the liner. But as we will see, this did not remain the case, and once the hijackers were disembarked, they became 'fair game' to U.S. intentions. The Italians had also prepared for a military option; this was not as an offensive measure, but as a defensive last resort. The underlying aim here was to maintain an integral part of Italy's Mediterranean policy, which was to avoid damaging their good relations with the Arab nations and the PLO.

Meanwhile, the first intelligence blunder had transpired. By Italian estimation, only a small fraction of the passengers were actually aboard the ship. The remainder had disembarked for a tour of the pyramids in Egypt. This was true. However, as the ship sailed in international waters from Egypt, its radio had been turned off, and U.S. and allied intelligence had lost the ship in the Mediterranean. None of the American, British, or Italian allied reconnaissance aircraft could locate the ship, which created a huge intelligence vacuum. It wasn't until the Israelis, who had been monitoring the ships whereabouts, contacted the U.S. through diplomatic channels, that the U.S. authorities were able to relocate the vessel.

What was common to both the Italians and the Americans, irrespective of national priorities, was the question of who was actually responsible for the hijacking.[71] Again, this is where good intelligence can become extremely helpful. The Americans had two theories: first was that of the Bureau of Intelligence and Research (INR) in the U.S. State Department. Although the hijackers had identified themselves as PLF members,[72] this particular faction of the PLO had split into three splinter factions, only one of which was loyal to Arafat. The other two were extremely hostile to Arafat and his budding relations with the U.S., and were in turn supported by Syria and Libya respectively. The State Department's belief was that the hijacking was an accident. Their theory was that Achille *Lauro* was not intended to be the target, but was seen as a means of transportation to get to the intended target in Israel, and carry out an attack, not specifically to target Americans.

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[71] David B. Ottaway and George C. Wilson, 'U.S. Reacts With Caution, Appropriate Action Is Discussed Among Governemtns Involved', *Washington Post*, October 9, 1985.

[72] Associated Press, 'Eccentric Force Claims Hijacking', *Washington Post*, October 9, 1985.

Both the Central Intelligence Agency (CIA), and the Defense Intelligence Agency (DIA) rebuffed this theory, believing that PLO ties to Italy and Egypt were too important to the PLO for an 'Arafat-friendly' faction to carry-out such attacks. That this had to be a faction which acted with the support of Libya or Syria. Getting this right was extremely important. If this was in fact an 'Arafat-friendly' faction, then there was an increased possibility that negotiations would be successful, if not, then there was little chance for their success. This would further determine how the U.S. would proceed.

Ultimately, the INR was correct. The hijackers were in fact discovered by a crew member quite accidentally, while they were cleaning their weapons. Once discovered, they had little choice but to react, and did so by taking the liner, and its passengers hostage. Their original mission was to disembark at the Israeli port of Ashdod, and carry out an attack in Israel.[73] This was determined by intelligence sources, mainly Israeli again, who intercepted communications which strongly indicated that this was a PLF faction headed by Abul Abbas, who carried strong loyalty to Arafat.[74]

The hijacking lasted two days, the liner cruising back and forth between Egypt and Syria, and during which time a disabled, wheelchair bound American passenger, Leon Klinghoffer, was murdered and thrown overboard.[75] This was unknown at first. After several unsuccessful attempts to obtain Israeli concessions for a prisoner-hostage exchange, the hijackers settled for an agreement for safe conduct - a guarantee

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[73] William Claiborne, 'Israeli Port Called Goal of Gunmen', *Washington Post*, October 9, 1985.

[74] Thomas L. Friedman, 'Israelis Say Tape Ties Top P.L.O. Aide to Ship Hijackers', *New York Times*, October 17, 1985; William Claiborne, 'Israeli Text Quotes Order by Abbas, Jerusalem Says Talk With Hijackers Proves Control by PLO Leader', *Washington Post*, October 17, 1985.

[75] Christopher Dickey, 'Pirated Ship Still at Sea; U.S. Deaths Unconfirmed', *Washington Post*, October 9, 1985.

for safety, negotiated by Egypt, and agreed upon by Italy, Great Britain, and Germany. The agreement for safe conduct concluded three points: it allowed free and safe passage to the hijackers, it prevented subsequent extradition or punishment, and it granted their custody to the PLO. This was an agreement the U.S. resisted, and that Italy consented to before knowing that the terrorists had murdered an American passenger.

This was a politically expedient option, especially for Egyptian President Mubarak, who was already under fire from intense public outrage[76] over the preceeding months over an Israeli raid in Tunis which claimed the lives of several Egyptian citizens.[77] Egypt held diplomatic relations with Israel, as well as with the U.S., the only Arab country to do so. It was the second largest recipient of U.S. aid, and home to one of the largest CIA foreign offices.[78] For Mubarak to side with the Palestinians on this occasion would potentially save him from the admonitions of his Arab neighbours, as well as Egyptian citizens of once again appearing as a U.S. 'pawn'.

Once the hijackers surrendered to Egyptian officials, it was confirmed that an American citizen had been murdered,[79] but this was only after they were safely in Egyptian custody. What was intended to be a diplomatic triumph for Italy, was instead, a forum for bitter counter-attack from the United States following the public release of Klinghoffer's death. With this new piece of information, U.S. demands for

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[76] Christopher Dickey, 'Surprising' U.S. Action Angers Egypt', *Washington Post*, October 12, 1985.

[77] Kathryn Davies, 'Tunis Victim's Funerals Spark Protest in Cairo', *The Guardian*, August 10, 1985. 'Tunisians Denounce U.S. Position On Raid - PLO Announces Toll'; *Associated Press Writer*, August 10, 1985;

[78] 'Egypt's Problem', *The Guardian*, October 12, 1985.

custody and prosecution were inevitable. The United States immediately demanded the extradition of the hijackers from Egypt to the U.S. for trial. Egyptian President Honsi Mubarak attested that the hijackers had already left Egypt en route to Tunis where they would be returned to Arafat. This was a major clash in U.S. - Egyptian interests. Reagan wanted the terrorists brought to justice - Mubarak wanted to avoid problems with his Arab neighbours. By turning over the hijackers to the U.S., would prove highly unpopular in the Arab community; but, the hijackers had not left Egypt.[80] Mubarak had only pretended not to know they were still in the country. Again, this was only a method to save face with his Arab neighbours, and to thwart any potential actions against Egyptian citizens. Once again Israeli intelligence sources, with their informal diplomatic contact with JSOC, had revealed to Colonel Oliver North through a military attaché in Washington, that the hijackers were still actually in Egypt. This was later confirmed through U.S. electronic surveillance.

The U.S. 'mission' at that point was purely a single focus; bring the terrorists to justice, no matter what. Colonel North proposed to Admiral Poindexter a similar action to that of a WWII operation,[81] when an intelligence source revealed that Admiral Isoroku Yamamoto, the 'architect' behind the Pearl Harbour attack, would be flying over the Upper Solomon Islands in the South Pacific. The U.S. sent up P-38 fighter planes, and shot it down. The intention here was not to 'shoot down' the Egyptian aircraft, but to force it down. The intended destination, was the NATO base in Sigonella, Sicily.

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[79] Christopher Dickey, 'Pirates Surrender Ship; 1 American Killed, Outraged U.S. Demands Egypt Prosecute Hijackers', *Washington Post*, October 10, 1985.

[80] Christopher Dickey, "Surprising' U.S. Action Angers Egypt', *Washington Post*, October 12, 1985.

Reagan approved the operation,[82] and within hours, General Stiner's plane carrying the Delta Force/hostage rescue and SEAL teams were dispatched for Sicily. Meanwhile, Rear Admiral David E. Jeremiah, on the carrier USS *Saratoga*, received orders to dispatch fighter aircraft and search for the Egyptian airliner carrying the hijackers, their mastermind, Abul Abbas and another Arafat emissary, Hani Al-Hassan. This meant that their intelligence had to be absolutely accurate with respect to the aircraft's identification number. Also, this had to be done as covertly as possible, which meant the four F-14 Tomcat fighter jets were flying off the coast of Crete with their running lights off, using a handheld flashlight to search for the aircraft's identification tags. They actually failed on the first try, intercepting General Stiners plane, but quickly recovered, and located the EgyptAir flight carrying the hijackers. When the F-14 turned on their running lights, they were just feet from the Egyptian airliner's wingtips, forcing him down to the Sigonella air base, where General Stiners aircraft and Delta Force troops were waiting.[83]

4.4.1 The Importance of Co-operation

The message unfolding here is that 'co-operation matters'. By the 9th of October, all the hostages had been freed, so the attention was now on punishing those responsible. But there was no 'home field' advantage for the United States; this was

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[81] North, UNDER FIRE pp. 206-207

[82] David Hoffman, 'Capture of Terrorists Began 6,000 Miles Away at Illinois Bakery', *Washington Post*, October 12, 1985.

[83] Loren Jenkins, 'U.S. Jets Intercept Hijackers' Plane, F14s Force Egyptian Aircraft to Land at Italian Base', *Washington Post*, October 11, 1985; David Hoffman and Lou Canton, 'U.S. Aims a 'Message' at Terrorist, White House Seeks to Limit Damage to Relations With Egypt', *Washington Post*, October 11, 1985; George C. Wilson, 'Weinberger Tells How Hijackers Were Intercepted, Crew of Egyptian Airliner 'Accepted the Inevitable', Defense Secretary Says, Praising Naval Aviators', *Washington Post*, October 11, 1985.

an act which occurred abroad, which would inevitably depend on the co-operation of an ally. This relies on one thing, and one thing only, compliance to international law. The United States had already shown blatant disregard for this by pouncing on the Egyptian airliner and were about to trample on Italian sovereignty. The results of the incident would prove a reflection of this.

While the Italians had been notified by the U.S. that the Egyptian airliner was to land in Sigonella, they had not, however, been notified that General Stiner's plane and the accompanying two C-141 transport planes with heavily armed U.S. troops, would be arriving along with it. Nor were they expecting U.S. forces to surround the plane to forcibly remove Abbas and the hijackers, and place them on an awaiting aircraft for a flight back to the United States for trial.

When the U.S. troops emerged from the transport aircraft to surround the Egyptian aircraft, they were immediately confronted by armed Italian soldiers and police, who surrounded the aircraft as well. The U.S. troops then positioned fuel trucks to prevent the potential take-off of the Egyptian aircraft - the Italians responded by blocking the American's path with heavy machinery. And there was the stand-off. U.S. troops and their allied Italian counterparts, heavily armed and nose-to-nose, while their respective commanders engaged in a shouting match.

President Reagan contacted Prime Minister Craxi, and agreed the American forces would 'stand down', allowing Italy to take custody of the hijackers and Abbas. But it was far from over. The Italians removed the hijackers, but Abbas and Hassan who were sent as emissaries for Arafat, claimed diplomatic immunity. Egypt, claiming the plane was on a government mission, insisted the aircraft enjoy diplomatic immunity as guaranteed by international law. The Craxi government had

to take these claims seriously, if it wanted to maintain good relations with his Arab neighbours, but more importantly, Egypt was holding the *Achille Lauro*, it's passengers, and Italian crew 'hostage' in Port Said in Egypt. This was more of a bargaining chip, in the event the Italians should give in to U.S. pressure.

Italy then moved the Egyptian plane from Sigonella to Rome, the flight shadowed the entire way by General Stiner in a smaller, training jet. Consequently, the United States had not received permission from the Italian government for that flight either. The Italian government protested - loudly - to the U.S. embassy, for it's further degradation of Italian sovereignty.

The United States, meanwhile, claiming a huge media victory over terrorism,[84] had requested the extradition of Abbas and the four hijackers.[85] Congress previously had passed an 'extraterritorial statute', making it a crime against the United States for taking a U.S. citizen hostage. The argument followed, that a state has a right to protect itself from foreign attack, and such attacks targeted Americans.

Under U.S. procedures, once a formal request for extradition has been made, the matter is then referred to the judges in order to determine the viability of the case and the applicable treaties. Following a judicial decision, the political arm of the requested government officially decides whether or not extradition will be allowed.[86] This is almost always the phase where political fears of retaliation and uncertainties about the foreign policy aspect, are masked behind legal technicalities and claims of

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[84] Lou Cannon, 'President Basks in Praise - Hill Critics Join in Applauding 'Message to Terrorists', *Washington Post*, October 12, 1985; Bernard Weintraub, 'We Want Justice' Reagan Declares - U.S. Message to Terrorists, He Says Is 'You Can't Hide', *New York Times*, October 12, 1985;

[85] Howard Kurtz, 'U.S. Officials Confident Of Power to Try Pirates, Extradition Pursued Under Italian Law', *Washington Post*, October 11, 1985.

'political offence exception'. This was not the case this time. Italy completely bypassed the legal stage, and Craxi immediately rejected the U.S. request for Abbas's extradition, claiming first, that the U.S. had 'insubstantial proof' of Abbas's guilt. Second, that since the Egyptian aircraft was on a governmental mission, it enjoyed extraterritorial rights. And third, Abbas was carrying an Iraqi diplomatic passport, and therefore enjoyed diplomatic immunity.

The Egyptian aircraft, still in Rome, had allowed the two envoys, Abbas and Hassan, to board a flight which was held for them, and fly to Yugoslavia, despite the U.S. government request for his detention.[87] An infuriated U.S. government quickly turned the extradition request around to Yugoslavia, which quickly denied the request[88] to an already furious Reagan administration. Following Secretary of State George Schultz's public chastising of Yugoslavia, the Yugoslav government was quick to remind the U.S. of their own ongoing extradition request for Aurotvik, wanted for genocide and war crimes in Yugoslavia, and who was enjoying political immunity in the U.S. His extradition was subsequently arranged immediately.

In the end, three of the four hijackers were tried in an Italian court[89] and given stiff penalties. Abul Abbas, was tried in absentia, and received a life sentence. By the

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[86] Note: in many countries and many cases, however, this remains a purely judicial decision as will be seen and discussed later on in Chapter 8.

[87] John M. Goshko and Lou Cannon, 'PLO Leader Slips From U.S. Grasp in Italy, Reagan Administration Accepts Release With Disappointment', *Washington Post*, October 13, 1985; Loren Jenkins, 'U.S. Protests Abbas' Departure After Issue of Arrest Warrant', *Washington Post*, October 13, 1985; Bernard Weintraub, 'Italy Said to Free 2 P.L.O. Aides Despite U.S. Arrest Warrant, Leader of Faction Linked to Hijacking Is Said to Depart in Disguise', *New York Times*, October 13, 1985.

[88] Robert Timberg, 'Yugoslavia Won't Yield Palestinian', *The Baltimore Sun*, October 14, 1985.

[89] Loren Jenkins, 'Hijackers to be Tried by Italians', *Washington Post*, October 12, 1985. *See also:* Philip Hager and Ronald Ostrow, 'U.S. Can Legally Extradite 4 Terrorists, Justice Dept. Says', *Los Angeles Times,* October 12, 1985; Howard Kurtz, 'Extradition Prospects Unclear', *Washington Post*, October 12, 1985; Lyle Denniston, 'In

end of 1996, however, all three hijackers had escaped from the Italian prison and remain at large. Abul Abbas, is currently living in Lebanon.

4.4.2 The Hijacker's Legal Status

The seizure of the *Achille Lauro* was the stimulus for legislation prohibiting acts of terrorism against maritime targets. Previously no international legislation existed specifically prohibiting terrorism only 'acts of piracy'. It should be clarified, that the *Achille Lauro* was in fact a case of terrorism and not piracy. Under customary international law no firm definition of piracy exists,[90] much as there is no authoritative definition of terrorism. In the strictest sense piracy is defined as 'every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder.'[91] The problem with this definition is that it fails to cover many acts which are deemed and tried as 'acts of piracy' but fall short in this very narrow definition. The more accurate and applicable definition covers all acts of 'violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.'[92] The delineation between definitions is as important as the

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U.S., 4 would face hostage taking trial', The Baltimore Sun, October 12, 1985; Stuart Taylor Jr., 'Italy More Likely Than U.S. to Try Suspects in Hijacking of Cruise Vessel', *New York Times*, October 12, 1985.

[90] 'There is no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea or any rate closely connected with the sea, by persons not acting under proper authority." J.L. Brierly, The Law of Nations An Introduction to the International Law of Peace, Sixth Edition, (Oxford: Clarendon Press, 1928).

[91] Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, The American Journal of International Law, vol. 82, no. 269, April 1988, p. 273. See also: Oppenheim, International Law A Treatise, Third Edition, (New York: Longman Green & Co., 1920).

[92] Halberstam, HIGH SEAS.

separation between terrorism and piracy. Although both are prohibited under international law, each prescribes a different legal response on behalf of states.

In the case of the *Achille Lauro*, this delineation is made on the following criteria; first, the incident could not legitimately be classified as piracy principally because the hijackers did not act toward the advancement of 'private ends'.[93] The basic understanding behind a terrorist act, is violence as a means toward a political end.[94] The hijackers immediate end was the release of Palestinian prisoners in Israel. Their purpose, arguably, was in the interest of gaining a Palestinian homeland and was representative of the Palestinian struggle for self-determination. Clearly not a private end. Modern international law also provides the definition of piracy to include the 'boarding of a vessel from a previous vessel'[95], or acts of one ship against another, which was not the case here either. Nor was the ship seized with the intention of *making* it a pirate ship, a criteria under Article 103 of the 1982 Law of the Sea

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[93] As designated by Law of the Sea Convention, 1982, Article 101. See: Blakesley, JURISDICTION at note 38.

[94] See Grant Wardlaw who begins Chapter 1 by noting: "Groups with little or no direct political power have demonstrated repeatedly in recent years that by employing certain tactics, central to which is the use of directed terror, they can achieve effects on a target community which are out of all proportion to their numerical or political power. Such tactics attract worldwide publicity, create widespread panic or apprehension and cause national governments to concede to the demands of small subgroups within society. These effects in themselves create a demand for an understanding of the use of terror for political ends." Grant Wardlaw, Political Terrorism, Theory, Tactics, and Counter-Measures, Second Edition, (Cambridge University Press), 1990, p. 3.

[95] The International Law Commission declared acts 'committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy'. See: *Summary of Replies from Governments and Conclusions of the Special Rapporteur (1956)*, 2 Yearbook of International Law Commission 18, U.N. Doc. A/CN.4/97/Add.1. to 3. in McGinley, IMPLICATIONS, p. 696 and at note 37. See also Oppenheim, LAW.

For arguments 'against' the two-ship requirement see: *The Santa Maria Incident*, (1961) where the Portuguese passenger vessel *Santa Maria* was seized in the Atlantic on the high seas by armed men who had boarded it as passengers. One member of the crew was killed and others injured. The men were supporters of General Delgado, a political opponent of President Salazar of Portugal. The ship was handed over to Brazil and returned to Portugal, but the men were given political asylum by Brazil. D.J. Harris, Cases and Materials on International Law, Fourth Edition, (London: Sweet & Maxwell, 1991), p. 407-408.

Convention.[96] The hijacking occurred as a result of discovery, otherwise the Palestinian mission would have concluded in Israel without ever involving the *Achille Lauro*.

The other distinction which must be made here as well, is that the Palestinians were indeed hijackers and not belligerents.[97] Belligerency applies to 'armed conflict' defined as hostilities which fall just short of an all out declaration of war, and refer to 'any armed conflict beyond isolated and sporadic acts of violence between the armed forces of states.[98] If the Palestinians and Israelis were engaged as such, then seizure of the *Achille Lauro* could be justifiable as a legitimate act of warfare applicable under the Geneva Conventions.[99] Still, 'belligerent(s)' are 'rebels who have organised a government while they fight, so that their war is considered lawful by international standards'.[100] The PLO, while organised as an entity, certainly does not concern itself

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[96] Law of the Sea Convention, December 10, 1982, Article 103: *Definition of a pirate ship or aircraft* A ship or aircraft is considered a pirate ship or aircraft it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act. Article 101 Defines piracy as consisting of the following acts:
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft.
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act of described in subparagraph (a) or (b).
Ian Brownlie ed., Basic Documents in International Law, Third Edition, (Oxford: Oxford University Press 1983), p. 187.

[97] It has been argued previously that the term 'political end' refers to 'acts by a revolutionary organisation that has not been recognised as belligerent by the offended state.' See: Halberstam: HIGH SEAS, p. 290 and at note 89.

[98] Linda A. Malone, International Law, (Larchmont, NY: Emanuel Law Outlines, inc., 1995), p.138.

[99] Under the Geneva Conventions Part IV: Civilian Population, Section 1: General Protection Against Effects of Hostilities, Chapter I: Basic Rule and Field Application, Article 48: In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. Article 49: Definition of Attacks and Scope of Application; 1. "Attacks" means acts of violence against the adversary, whether in offence or in defense.
See: http://www.deoxy.org/wc/wc-proto.htm

with legitimate methods of warfare anymore than it considers the importance of international standards. In short, belligerent status is only awarded in accordance with specific criteria established by international law, which ultimately the PLO do not meet.[101]

It is debatable that the Palestinians qualify for combatant status under Geneva Protocols,[102] though under the Geneva requirements the PLO would have to have committed itself to abiding by international humanitarian law. The PLO had agreed to try and punish the hijackers once they had been released into PLO custody, which is in keeping with the requirements of international law. Regardless of whether or not

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[100] See: Oran's Legal Dictionary, West's Legal Directory Law Information Center, http://www.wld.com/cgi-bin/oran.cgi?uniqueid=664.

[101] The case for belligerent status can only be attained by an entity who meets the following requirements: (1) the other party to the conflict must have recognised the entity as a belligerent; (2) the entity must have observed the laws of warfare; (3) the entity must have a properly commanded armed force; (4) the entity must have some semblance of government; (5) the entity must have control over some portion of territory. Convention Article 49. For an alternative argument of the status of the PLO as belligerents see: O'Brien, *The PLO in International Law*, Boston University International Law Journal, vol. 2, no. 349, 1984. Kassim, *The Palestinian Liberation Organisation's Claim to Status: A Judicial Analysis Under International Law*, Denver Journal of International Law and Policy, vol. 9, no. 1, 1980. For discussion of the legal status of the PLO see: Friedlander, Levine, Kassim, Dialogue: *The Legal Status of the PLO*, Denver Journal of International Law and Policy, vol. 10, no. 221, 1980. See also: Gerald P. McGinley, *The Achille Lauro Affiar - Implications for International Law*, Tennessee Law Review, Vol. 52, 1985 pp. 692-727.

[102] Article 43 states:

> 1. The armed forces of a Party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an international disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

the U.S. recognised the PLO as a legitimate entity, or the U.N. recognised them as a legitimate government. In either event, recognition is not a requirement under the Protocols.

Even as 'assumed' combatants engaged in conflict against Israel and given the 'right' under Article 43 to participate, they may then *only* participate against Israel, which was not the case in hijacking the cruise liner, regardless of whether or not it was reactionary. The one clause consistent in *all four* of the Geneva Protocols is Article 3,[103] which expressly prohibits executions, the style in which Klinghoffer was killed, as well as murder and hostage taking. Although the passage makes reference to 'territorial limitations' and 'international conflicts', this does not necessarily negate the Palestinians eligibility. The *Achille Lauro* was seized in Egyptian waters,[104] and therefore Egyptian territory, making Egypt bound by treaty, as they are signatories to

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[103] In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, and cruel treatment and torture;

(b) taking of hostages;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

the Geneva Convention. The requirement for an international conflict is a matter of opinion on how conflict in the Middle East is characterised. If it is in fact viewed as an international conflict, then the taking of civilian hostages is still prohibited under the Conventions.[105] As an 'internal' conflict, the Palestinian's actions are still in violation based on the U.S. as a 'victim' state of the PLO, which would then be viewed as an 'extension' of a state, and therefore in violation of Article 4 of the Conventions.[106]

Ultimately, if the hijackers qualify for such status, then Egypt[107] and Italy[108] as signatories to the Geneva Convention were bound by treaty to prosecute the hijackers as war criminals, if not for terrorism.

4.5 Applicable Treaties

Even if Egypt and Italy did not find fault under the Geneva Protocols, there were other existing tools of international law which were applicable. Relevant international

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[104] *Newsweek*, GETTING EVEN

[105] Convention IV, The Protection of Civilians in Time of War, Article 34.

[106] Part I General Provision under Article 4 of the Geneva Convention pertains directly to who may be taken as prisoner. Article 4 Section A of the Convention states: Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of armed forces.
Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements fulfil the following conditions:
That of being commanded by a person responsible for his subordinates;
That of having a fixed distinctive sign recognizable at a distance;
That of carrying arms openly
That of conducting their operations in accordance with the laws and customs of war
Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
Persons who accompany the armed forces without actually being members.

[107] Egypt ratified the treaty on December 8, 1949. See: *Geneva Protocols*

[108] Italy ratified the treaty (with reservation) on December 8, 1949. *Ibid.*

agreements which pertain to the *Achille Lauro* incident are the U.S./Italian Extradition Treaty,[109] the U.S./Yugoslavia Extradition Treaty,[110] and the UN Convention Against the Taking of Hostages.[111]

4.5.1 The UN Convention Against the Taking of Hostages

The Hostages Convention provides the legal framework necessary toward the 'prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism'[112]

Inherent within the convention is the requirement to extradite or prosecute persons[113] within the state parties jurisdiction who take hostages.[114] Similarly this applies to attempts and accomplices of hostage taking,[115] imposing the same obligation upon states[116] regardless of the jurisdiction of the act,[117] and irrespective of

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[109] Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, October 13, 1983, entered into force September 24, 1984. T.I.A.S. 10837. See: International Terrorism: A Compilation of Major Laws, Treaties, Agreements, and Executive Documents, Report Prepared for the Committee on Foreign Affairs U.S. House of Representatives, (Washington: U.S. Government Printing Office, 1987), p. 267-69. [Hereinafter cited as TERRORISM, REPORT]

[110] Extradition Treaty Between the Government of the United States of America and the Republic of Servia, October 25, 1901, 32 Stat. 1890, T.S. No. 406.

[111] UN Convention Against The Taking of Hostages, December 17, 1979. Entered into force for the U.S., January 6, 1985. Hereinafter cited as Hostages Convention'. See: TERRORISM, REPORT.

[112] Hostages Convention, preamble: '*Being convinced* that it is urgently necessary to develop international co-operation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism, *Have agreed* as follows:'

[113] Article 8

[114] Article 1

[115] Article 1 - section 2- subsection a & b

[116] Article 2 & Article 3

[117] Article 5

whether or not an extradition treaty exists.[118] The only time this would not be the case, is if an individual enjoys status under the Geneva Convention or the Additional Protocols,[119] in which case the Hostage Convention would be superseded.

4.5.2 The Italian-American Extradition Treaty

The U.S./Italian extradition treaty follows the modern international practice of reciprocal extradition, provided the circumstances of the criminal offence are punishable by the laws of both contracting parties. Such criteria avoids having to identify within the treaty, specific crimes for extradition. The offender is then required to be extradited to the requesting state; the case has to be submitted to the judicial authorities of the requested state.[120] Specific to the treaty, an offence is extraditable only if it is punishable by a minimum of one year's deprivation of liberty. In the event the extradition request pertains to an individual who has already been sentenced, extradition is allowed only if a minimum of six months remains on the penalty still to be served.[121] Extradition applies in all cases where the penalty is more severe than the minimum requirement.[122] Since it is the behaviour rather than the specific criminal act which determines how punishable or extraditable an incident is,

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[118] *Article 9* -- HC also SUPERSEDES any existing extradition treaty

[119] Article 12

[120] U.S. Italian Treaty of Extradition, Article I.

[121] Article II, paragraph I

[122] *Ibid.*

there exists a wide margin of interpretation as to the degree of criminality of the specific action.[123]

Jurisdiction extends beyond the territorial limits of the requesting state, provided the offender is a national of the requesting state.[124] The requested state must extradite in such circumstances, regardless of whether or not its laws maintain the offence as punishable.[125] Extradition cannot be denied because the person is a national of the requested party.[126] The mandatory extradition of nationals distinguishes this from most other treaties in force,[127] which negate this option, suggesting the greater interest on behalf of both parties lies in the prosecution of international criminals rather than state policy.[128]

Extradition may be refused on the following grounds: first, the request for which extradition is sought is for political offence, or for the punishment of a political offence.[129] The one caveat to this is the overriding obligation imposed by multilateral international agreements.[130] Those offences with characteristics such as those which affect public safety, harmed persons, or a particularly ruthless crimes, will be taken

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[123] Article II, paragraph II.

[124] Article III

[125] This provision was significant for Italy since Italian law allows for the prosecution of nationals irrespective of where the offence was committed. See: Lt. Cmdr. Larry A. McCullough, JAGC, USN, *International and Domestic Criminal Law Issues in the Achille Lauro Incident: A Functional Analysis*, Naval Law Review, Winter 1986, p. 65, and at note 90.

[126] Article IV.

[127] McCullough, DOMESTIC CRIMINAL LAW, p. 65

[128] Ibid. p. 66.

[129] Article V, sec. 1

[130] Article V, sec. 2.

into account when assessing the weight of the extradition claim.[131] Second, extradition will not be granted for military crimes which are not under ordinary criminal law.[132] Third, extradition for 'double jeopardy' requests will not be granted. Persons convicted, acquitted, pardoned, or have served their sentence for the offence in question, will not be extradited to the requesting party.[133] Nor will extradition be granted if the person sought is being prosecuted by the requested state for the same acts as the requesting state who seeks their extradition.[134] Fourth, extradition will be denied when the statute of limitations for the offence committed or the penalty phase, has expired under the laws of the requesting state.[135] Finally, extradition will not be granted when the offence committed is punishable by death. Until such time the requesting state can assure that the death sentence will not be carried out, extradition will be refused.[136] This is in accordance with most all modern extradition treaties.

The actual procedure governing extradition must fall in accordance with Article X of the treaty. All requests for extradition must be made through diplomatic channels,[137] accompanied by evidence of the location and identity of the person sought.[138] All particulars including time and location of the offence,[139] along with

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[131] Article V, sec. 2.

[132] Article V, sec. 3

[133] Article VI

[134] Article VII

[135] Article VIII

[136] Article IX

[137] Article X, section 1

[138] Article X, section 2(a)

applicable laws, description, and identification of the offence must be disclosed.[140] In addition, the legally prescribed punishment[141] and limitation for prosecution of the offence must be mentioned.[142] When a request for the extradition of persons not yet convicted, the above criteria apply.[143] In addition, a certified arrest warrant must be produced;[144] or a summary of the facts of the case to include relevant evidence, and a conclusive argument providing credible proof that the persons sought did in fact commit the offence.[145]

Cases requiring considerable speed and urgency in order to prevent the likelihood of the person sought from fleeing, require the prompt conclusion of a formal request for extradition. In such circumstances, the requesting state can seek provisional arrest up to forty-five days.[146] No state, however, may prosecute for any crime not specifically mentioned in the extradition request.[147] Nor may the party be 're-extradited' to a third state.[148]

4.5.3 The U.S.-Yugoslavia Extradition Agreement

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[139] Article X, section b

[140] Article X, section c

[141] Article X, section d

[142] Article X, section e

[143] Article X, section 3

[144] Article X, section 3a

[145] Article X, section 3b

[146] Article XII, section 1

[147] Article XVI, sections 1, 1a

[148] Article XVI, section 2

Extradition between the United States and Yugoslavia is governed by the 1901 Agreement concluded between the US and (then) Servia in 1906.[149] Unlike the treaty between the US and Italy, the agreement provides a list of extraditable offences, among which include piracy, and murder.[150] The agreement stresses that participation in any extraditable offence which may be tried as a felony in the United States, will constitute an extraditable crime.[151] Upon receipt of a formal extradition request, the treaty provides for the arrest and detention of the person sought. In the event of a request for provisional arrest, the treaty mandates the immediate arrest and detention of the person sought, for up to two months or until a formal request for extradition is received.[152] The one exception to this is in cases where the demand for extradition is of a political character, in which case the requested state may deny extradition.[153]

4.6 Conclusion

States must rely on international co-operation through the methods presented and outlined in various treaties and conventions, if they are to counteract the effects of terrorism and the advantage terrorists gain by separating themselves from the jurisdiction where they have carried out their attack. The U.S. in this case, had established the legal groundwork long before the crisis had occurred, and therefore should have been able to rely on methods of international law enforcement and

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[149] Treaty of Extradition, October 25, 1901, United States-Servia, 32 Stat. 1890, T.S. No. 406.

[150] US/Servia, *Article II.*

[151] Ibid.

[152] Ibid, Article IV.

[153] Ibid, Article VI.

compliance to these methods, from Italy, Egypt and Yugoslavia. Similarly, Italy and Egypt should have counted on the U.S. working within the confines of international law; or resorting to diplomatic measures. In a perfect world, perhaps. However, as in any case which relies on international law, states retain the right to protect their own interest, and in the case of terrorism, to protect their own citizens. But this should not have to rely on methods which act outside the parameters of international law, else states become no less lawless than the terrorists themselves. Compliance is important. It maintains good relations between states, and in doing so creates stability, and social order. The only way this is achieved, is through co-operation and very rarely, if at all, is it achieved through unilateral action. And very rarely, if at all, will unilateral action be tolerated by a world superpower.

What the *Achille Lauro* shows us, is that no state, perhaps especially the United States as the world's only remaining superpower is wise to blatantly defy international law, and especially when dealing with its allies. In this particular case, the U.S. would have been better served by soliciting influence through diplomatic or economic channels in order to evoke co-operation.

What the *Achille Lauro* also demonstrates is the difficulty that even allies with a common interest in suppressing terrorism have in working together when vastly different interests are at stake. All of the parties in this case had very different priorities in seeking an end to the crisis. This hindered the ability for the crisis to play itself out to a more amicable end.

As a result of aggravating their allies, the U.S. enlisted neither assistance in capturing Abbas, nor sympathy for the loss of Klinghoffer's life. While the four hijackers were captured, and three of the terrorists ultimately were tried and jailed in

Italy, the mastermind behind the attack went free. If law is to have an impact on terrorism, it must punish terrorists. Minor victories against footsoldiers is harldy a major triumph against terrorism. It does the international community little good to win skirmishes, and lose wars. As best commented upon by Brian Jenkins:

> *"In our single minded pursuit of terrorists, a campaign that perhaps becomes too high on the list of priorities, we run the danger of combating terrorism the same way we fought the war in Vietnam -- unmindful of the collateral damage. There too we faced an elusive foe who did not fight by our rules. There too we sought a quick military victory.*
>
> *In our euphoria over the successful capture of four terrorists, we would now like to believe that we have turned the tide against terrorism, that terrorists now will think twice before attacking Americans. It is far more likely that the war against terrorism will be a protracted contest, with dramatic victories on our side few and far between, and ultimately no final victory."*[154]

The *Achille Lauro* reveals the value of international co-operation; the ramifications of abandoning it altogether; the importance of international allies when fighting terrorism, and the legal issues which surface in its absence. What this case study also reveals beyond the initial issues of response, compliance, or the punishment of terrorists discussed in the beginning of this chapter; is the reinforcement of the idea that extradition is a process. Not a process defined on the merits of military strength or power, not a process defined by unilateral action, but one that is defined by a system; and this system functioning as a sum total of its parts, can feasibly seek to punish and potentially curtail acts of terrorism.

Still, it is worthy of examination and discussion, the potential for the system to break down even when all the desirable pieces appear to fall into place. The effects of this, often caused by the political influence or the political relationship to terrorist

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[154] Brian Michael Jenkins, *The Aftermath of the Achille Lauro*, RAND Document No. P-7163, October, 1985, p. 1.

extradition, can potentially undermine co-operation, and affect compliance to international agreements; and which can hinder extradition.

Chapter Five

Politics and Co-operation: TWA 847 and the Extradition of Mohammed Hamadei

> *"This was the terrorism case to end all terrorism cases...[w]e had this horrible crime, we had terrific evidence, we had an overarching American interest...We were ready."*[1]

5.1 Introduction

There are occasions when regardless of the amount of international co-operation, or evidence, and even if the facts present a relatively clear-cut argument for extradition; does it necessarily dictate that extradition will ensue? In these circumstances other factors arise affecting the ability for states to honour existing international agreements. Such as, for example, the existence of political undertones which not only have the potential to extinguish the chances for terrorist extradition; but to potentially alter the over-all extent to which the terrorist is punished. This is similar to the discussion in Chapter 1, which surveys the *Lockerbie* example, and the political relationship between extradition and terrorism.[2] Political influence has as strong affect on the outcome of terrorist extradition cases, especially if there remains a fear of future terrorist reprisals. Unlike the *Achille Lauro* example, which lacked the fundamental cohesion of basic co-operation, what this discussion examines is how compliance is affected by the circumstance of political influence, and how legal mechanisms currently in place are affected by this. A clear example which

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[1] Remarks by Joseph diGenova, then U.S. attorney for the District of Columbia who was expected to try Hamadei. David M. Kennedy, Dr. Torsten Stein, Alfred P. Rubin, *The Extradition of Mohammed Hamadei*, 31 Harvard International Law Journal 1, Winter 1990, p. 6. Hereinafter, HAMADEI EXTRADITION

[2] See: Chapter 1.1.2 The Lockerbie Example, Supra at p. 5

demonstrates this point, is the case of TWA 847, and the subsequent U.S. extradition request for Mohammed Hamadei from West Germany.

The events of TWA 847 signified an ending point in terms of tolerance for Reagan. The United States administration plagued with incidents up to, and including, this crisis – would be dealt a crushing blow to their fight against terrorism. TWA 847 was not just a terrorism incident – it was terrorism 'event'. Over the course of seventeen days, the terrorists received top headlines from every news medium worldwide. This would not work in Reagan's favour. Before the crisis was over, the U.S. would break the very mantra of it's policy of 'no concessions' and once again, the terrorists would escape.

Two years following the incident, the ringleader, Mohammed Ali Hamadei, was apprehended in West Germany. This created a new challenge for the administration. Finally, 'they caught one'. And what could have presented itself as the United States first opportunity for a terrorist trial, ended up in the West German courts, due more to political influence than international co-operation.

Realistically, Hamadei could only be viewed as a 'test case' for the United States. Terrorism had never been a problem on U.S. soil; still, over 30 percent of all international terrorism incidents were aimed at the U.S. or American citizens abroad.[3] The Reagan administration made countering terrorism part of the foundation of their foreign policy, and strenuously argued that terrorists should be caught and tried no differently than common criminals as part of an international community effort to

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[3] Half of the worldwide international terrorist incidents in the 1980s were aimed at only 10 countries; one-third of the total were targeted directly at the United States. The number of terrorist acts has generally risen since official statistics were first compiled in 1968, with a trend toward bloodier incidents with more fatalities. Attacks caused 20 fatalities in 1968 compared to 926 in 1985. Source: U.S. Department of State, Patterns of Global Terrorism 1987.

thwart terrorism.[4] This was not as enthusiastically received as the U.S. would have hoped, especially in Europe, where despite a similar value system, there was a general tendency toward 'avoiding' rather than 'confronting' terrorist aggression.[5]

Reagan would supply that motivation by encouraging Congress to pass a number of statutes in 1984[6] and 1986[7], detailing specific terrorist acts as criminal acts, and which extend jurisdiction to include American citizens abroad. Still this required a substantial amount of international cooperation, which the administration soon realised, proved difficult.

The TWA 847 incident and the subsequent request for extradition of its ring-leader, Mohammed Ali Hamadei, demonstrates three things. First, how states choose their method of strategy in dealing with a terrorist incident, in this case an airliner hijacking which became a ground-level hostage incident. Second, the political aspect of decision making, which is what gives this case its depth. Co-operation among allied states whose political, economic, or diplomatic ties create a powerful force in international relations and a relatively strong case for compliance. But this differs from the formalities of international law, where compliance is dependent on the intricacies of the courts, as well as the political authority to enable it. Third, the

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[4] *New York Times*, April 15, 1986, and June 15, 1985

[5] *New York Times*, April 17, 1986

[6] Several significant bills were passed in 1984 which enable the U.S. to expand its jurisdiction over terrorists and enhance the U.S. role in the prosecution of terrorists. Such examples include: making it a federal offence to commit an act of violence against any passenger on a government or civilian aircraft; extending U.S. authority to prosecute any person who destroys a foreign aircraft outside the U.S.; legislation covering crimes against families of high-ranking officials; legislation for the U.S. to prosecute persons who travel or use transportation / communications facilities in interstate or foreign commerce with the intent to murder for compensation; and the authority from Congress to reward any individual for information leading to the arrest and onviction of a person who committed terrorist acts against U.S. citizens or property.

interpretation and application of the law. This was a clear-cut incident, not nearly as ambiguous as the *Achille Lauro* was. There were cleanly defined legal parameters, which applied to exactly this type of incident. But the outcome was less reflective of the legality of the decision than the politics of co-operation.

The first part of this chapter will discuss the TWA 847 incident and the subsequent hostage crisis which followed. Congruous to this is a discussion of concessions, and the choices that are available to states in the context of a hostage taking incident.

The second part, examines the second half of the case itself – the extradition of Hamadei. Specifically, the legal options that were available which would determine his extradition or trial, and the political factors, which became the thrust of decision making.

The third part, reviews the legal options which were in place and which clearly adjudicate an incident such as this one. What this seeks to establish, is that there were clear-cut legal mechanism applicable to the case.

If the law had worked the way it was set out to, then Hamadei should have been extradited. The reasons behind why he was not - are why the Hamadei example is significant to the study of compliance, and how that in turn affects the strength of the extradition regime.

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[7] The most significant piece of legislation passed in 1986 was a result of the Achille Lauro hijacking. The International Maritime Organization (IMO) acting on a U.S. initiative passed The Maratime Saftey Act, a measure to insure the protection of passengers and crews aboard ships.

5.2 The Hamadei Case

> *"[T]he American people are not - I repeat not - going to tolerate intimidation, terror, and outright acts of war against this nation and its people. And we're especially not going to tolerate these attacks from outlaw states run by the strangest collection of misfits, looney toons, and squalid criminals since the advent of the Third Reich."*[8]

Hostage taking has some very clear advantages, especially to a politically violent 'terrorist' group. One of the clear aims of terrorism is to call attention to a particular cause. This is greatly assisted by involving hostages.[9] Now, you have something to call attention with, 'live bait' if you will, and for as long they remain, then so does the attention. Focused, inquisitive, immersed, attention, which is exactly what the media[10] gave the TWA 847 incident for seventeen days.[11] Hostage taking adds drama. For the state, in this case the U.S., the question is; when the lives of ordinary citizens are at stake, how does a state choose between its responsibility to its citizens, and responsibility to its policies? For the terrorist, the objective is how to render the most powerful nation in the world - powerless. The drama then unfolds around the standoff. A hostage situation is not 'indefinite', but the idea is to force demands, then get away safely, within an allotted amount of time. The challenge for the state, is resist demands, rescue the victims, and emerge victorious against terrorism. Unfortunately, it doesn't always work that way, and TWA 847 was not the exception.

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[8] President Ronald Reagan's remarks to the American Bar Association, July 8, 1985.

[9] See: Political Hostage-Taking as a New Form of Crisis; Arthur Schlesinger Jr., 'When Terrorists Take Hostages', *New York Times*, June 27, 1985.

[10] For more discussion on terrorism and the media see: M Tugwell, Terrorism and Propaganda: Problem and Response and R D Crelinsten, Power and Meaning: Terrorism as a Struggle over Access to the Communications Structure, both in Paul Wilkinson and A M Steward eds, Contemporary Research On Terrorism, (Aberdeen: Aberdeen University Press, 1987).

[11] See: The Michigan State University Study discussing the amount of media coverage which was given to the TWA 847 incident, over some 729 minutes over seventeen days: Tony Atwater, Terrorism and the News Media Research Project: *Network Evening News Coverage of the TWA Hostage Crisis*, Mass Communication and Society Division of the Association for Education in Journalism and Mass Communication, Boston, MA, 1986

On June 14, 1985, Trans World Airlines flight 847, en route from Cairo to Rome landed for a scheduled stop in Athens.[12] Within minutes after the flight's departure, the plane carrying 153 passengers and crew, 100 of whom were American citizens, was taken over by two Lebanese members of the radical Shi'ite group Hezbollah,[13] and forced to fly to Beirut.[14] Brandishing grenades and pistols, they demanded the release of 766 Shi'ite prisoners held in Israel, many of whom were captured during the recent Israeli occupation of South Lebanon.[15] The two men, who would later be identified as Mohammed Ali Hamadei and Hasan Izzaldin, threatened to kill all the passengers and blow up the plan if their demands were not met.[16]

Once in Beirut, the hijackers exchanged food and fuel for passengers, mostly women and children, then forced the pilot, Capt. John Testrake, to fly to Algeria where more passengers were released. The plane took off again for Beirut where the

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[12] The Boeing 727 had landed in Athens to take on additional passengers, among of which numbered several members of the Roman Catholic church, and two young Arab men in their early 20's, initially identified as Ahmed Gharbiyeh and Ali Youness, both Lebanese. The two had managed to smuggle on board two grenades and a 9-mm pistol undetected by wrapping them in fiberglass insulation.

[13] A third member of the group, unable to board the flight, was captured later at Athens airport and identified as Ali Atweh, a 21 year old Lebanese carrying a fake Moroccan passport. See: 'Journey of Flight 847: A Logbook of Terror', *New York Times*, June 17, 1985.

[14] The initial demands were to fly to Algeria, but the aircraft lacked fuel. After explaining this to the hijackers, they demanded Cairo, then Beirut. See: *Ibid.*

[15] In June 1982, Israeli troops invaded Lebanon. By spring 1985, they began to withdraw to a security zone they had established in the southern part of Lebanon. During the withdrawal, terrorists attacked had increased on Israelis and their client force the SLA (Christian Southern Lebanese Army). As a result, Israeli troops detained people they suspected of terrorist involvement in southern Lebanon in makeshift prisons inside Lebanon. As they continued to pull back, the prisoners were moved from the makeshift camps to Atlit prison in Israel. A large majority of these prisoners were Lebanese Shi'ites, and it was the Lebanese Shi'ite community which sought the release of all of the Atlit prisoners. See: Rodney A. Snyder, *Negotiating With Terrorists: TWA Flight 847*, Pew Case Studies in International Affairs, Case 333, (Washington, D.C.: Institute of Diplomacy), 1994, p. 1

[16] Don Podesta, 'Hijackers Hold Americans on TWA Jet', *Washington Post*, June 15, 1985.

hijackers made good use of the empty space by bringing on additional Amal militia,[17] before taking off, again, for Algiers.

The hijacking segment of the crisis lasted for two days, with the plane moving constantly between Beirut and Algeria. During its second stop in Beirut U.S. Navy diver, Robert Stethem was brutally beaten by one of the hijackers, Mohamed Hamadei. In front of a swarming international media[18] he was shot in the head and his body thrown onto the tarmac at Beirut airport as the plane was taking off, again, for Algeria.[19] On the aircraft's final landing in Beirut, all but 39 hostages were released,[20] and the second phase of the incident began, the hostage crisis. The remaining 39 passengers were handed over to waiting Amal militiamen[21] who held them in various locations throughout Beirut over a period of seventeen days.

TWA 847 was the second major hijacking incident for the Reagan administration. Only six months earlier, terrorist had seized a Kuwaiti airliner and forced it to fly to Iran.[22] Once in Tehran, they tortured and killed two American passengers while

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[17] A less radical faction of the Shi'a movement, founded in 1974 by Shi'a cleric Imam Musa al-Sadr who organized the 'Movement of the Underprivileged' to 'advance Shi'a interests and improve the community's lowly socio-economic conditions'. See: Bruce Hoffman, *Shi'a Terrorism, The Conflict in Lebanon and the Hijacking of TWA Flight 847*, Rand Document P-7116, July 1985, p. 2.

[18] This was without a doubt a huge media spectacular. The incident caught top headlines and television news broadcasts for weeks throughout the entire crisis. This kind of attention was exactly the intention of the terrorists, and arguably, of terrorism itself. State Department legal advisor comments to this effect, "The hijackers sought publicity, and they got it. The world was treated to a media extravaganza that gave irrisponsibility and tastelessness a new meaning." Abraham Sofaer, *Fighting Terrorism Through Law*, Department of State Bulletin, October 1985, p. 38.

[19] 'Arabs Seize U.S. Airliner; 1 Killed', *Los Angeles Times*, June 15, 1985; Robert Fisk, 'Lebanese gunmen shoot passenger on hijacked plane', *The London Times*, June 15, 1985.

[20] Michael Dobbs, 'Hijackers Release 64 in Algeria, Set New Deadline', *Washington Post*, June 16, 1985.

[21] Joseph Berger, 'Days of Mideast Terror: The Joruney of Flight 847', *New York Times*, June 22, 1985.

[22] '155 On A Jetliner Hijacked to Iran', *New York Times*, December 5, 1984; 'Hijackers In Iran Reported to Kill Two More On Jet', *New York Times*, December 7, 1984.

demanding the release of seventeen Shi'ite prisoners from Kuwait.[23] Although the aircraft lay stationary in Tehran for six days, no plans for a rescue attempt were made.[24] Nor were there any attempts to rescue the half a dozen American hostages which had been taken during a series of kidnappings from December 1984 and June 1985. At the time of the TWA 847 hijacking, the previous six months had left three Americans dead,[25] and five as hostages[26] to terrorist incidents in the Middle East.

There were not a lot of options open to the U.S. during the TWA crisis. A rescue operation was almost impossible because the aircraft was in constant motion.[27] In addition to which, the U.S. received almost no support from its allies. The prospect of military action ostricised both Italy, who delayed granting permission for U.S. troops landing at Sigonella,[28] and Algeria, who refused to tolerate any military action on Algerian soil. In fact the TWA flight was allowed to leave Algiers for Beirut once press speculation hinted that an American commando rescue team was heading for the

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[23] John Kohan, 'Horror Aboard Flight 221 - Gun-toting terrorists bring murder and mayhem to a hijacked Kuwaiti Airbus', *Time*, December 17, 1984.

[24] Terrence Smith, 'The "Shultz Doctrine" is Rendered Moot In Iran', *New York Times*, December 16, 1985.

[25] One of these was CIA Chief of Station William Buckley, captured by the Islamic Jihad and subject to prolonged torture before he died on June 3, 1985 from torture and lack of medical treatment.

[26] 3 December 1984: Peter Kilburn, American University at Beirut
8 January 1985: Reverend Martin L. Jenco, Catholic Relief Service in Beirut
16 March 1985: Terry Anderson, Associated Press Correspondant
28 May 1985: David Jacobsen, American University at Beirut Hospital Director
9 June 1986: Thomas Sutherland, American University at Beirut.

[27] Former CIA Director Stansfield Turner, claims one possible reason the hijackers continuosly shuttled back and forth was because of the successful rescue operations conducted at Entebbe and Mogadishu - and to remain in one place for an extended period of time may be risky. In addition to which, media reports of U.S. Delta Force troops were ready to assemble and fly to the planes location. See: Stansfield Turner, Terrorism and Democracy, (Boston: Houghton Mifflin Company, 1991), p. 190. Hereinafter: DEMOCRACY.

[28] George P. Shultz, Turmoil and Triumph, My Years as Secretary of State, (New York: Charles Scribner's and Sons, 1995), p. 655. Herinafter, TURMOIL.

Mediterranean region.[29] Algerian President Chadli Bendjedi was not only adamant about not wanting an American military presence on the ground, but neither did he want the embarrassment of declining U.S. troops on his territory.[30] Getting 'rid' of the aircraft, was the easiest way out. The other Arab nations, not surprisingly, were not of any assistance at all.[31] So Reagan's choices were to either 'wait or see', which was unrealistic, or to strike a deal for the hostages. Although it represented a break in U.S. policy, the latter was what the administration eventually opted for, which would also depend on the cooperation of the Israelis.

The Israeli government was not entirely opposed to the release of the Shi'ite prisoners; in fact they were already in the process of releasing many of them on account of holding them under 'questionable' circumstances.[32] Some 300 prisoners had been released before the hijacking even took place.[33] Over time the rest would have eventually been freed. However, if the United States was prepared to ask the Israeli's to release the remaining prisoners, then Israel was prepared to do so, *but only if the U.S. requested them to do so*.[34] Israel placed this onus on the U.S. primarily because it exonerated the Israeli government of responsibility. The U.S. opposed this

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[29] William M. Carley, 'Terror Aloft, Anatomy of a Hijacking Is A Tale of Misadventure And Anguish for TWA', *Wall Street Journal*, June 15, 1987.

[30] TURMOIL, p. 656

[31] William L. Chaze, Robert S. Dudney, James N. Wallace, Joseph P. Shapiro, Dennis Mullen, 'Reagan's Hostage Crisis', U.S. News and World Report, July 1, 1985.

[32] This was a clear violation of The Fourth Geneva Convention dealing with with treatment of civilians in wartime.

[33] Dan Fisher, 'Reagan Warning: Hijackers, Beware Israel May Free Shia Detainees if U.S. Asks', *Los Angeles Times*, June 17, 1985.

[34] Mary Curtius, 'Israel searching for way out of imapsse, *Christian Science Monitor*, June 18, 1985.

since 1) such a request would be an outright disownment of their policy, and 2) the belief that it could potentially lead to future hostage incidents.[35]

The U.S. viewpoint was that a concession such as this as placed Americans all over the world in danger. This was a clear concern of Reagan's and the underlying reason for his position: "[t]he decision isn't so simple as just trading prisoners. The decision is, at what point can you pay off the terrorists without endangering people from here on out once they find out that their tactics succeed."[36] It was clear that neither the U.S. nor Israel[37] wanted to been seen as making a deal with the hijackers. So the alternative was to *not* be seen, which was the wisdom behind the negotiations would take place between the U.S. and Israel. An elaborate 'face-saving' manoeuvre to maintain the integrity of both nation's 'no concessions' policy.[38]

5.2.1 The Good and the Bad of 'No Concessions'

> *The terrorists say to us, "Look, it's very simple. Change your policy, and no more planes are hijacked. Figure out a way to give us what we want and no more children will be killed. We'll release your hostages if you free our brothers or pay us ransom. After all, injustice has made us desperate." That's the con job they try to put over on you.*[39]

There are advantages to a 'no concessions' policy.[40] It looks good for a government to be able to stand firm to terrorist demands, and comforting for a nation

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[35] George D. Moffett III and Peter Grier, 'Hijack confronted US and Israel with agonizing choices', *Christian Science Monitor*, June 17, 1985.

[36] TURMOIL, p. 656

[37] Mary Curtius, 'Israel searching for way out of impasse', *Christian Science Monitor*, June 18, 1985

[38] 'What Price For the Hostages', *U.S. News and World Report*, July 8, 1985.

[39] Address by Secretary of State George P. Schultz to the Anti-Defamation League of the B'nai B'rith, February 12, 1988.

to see their government 'unwavering' to a group of radical criminals. By maintaining a strong stance, also invites the possibility of support from other like-minded nations with similar anti-terrorism policy. Alternatively, negotiating concessions can minimize risk, and potentially prevents escalation of a crisis. But these are short-term perks, not long-term strategy.

In the long run, the advantages are considerably less for arguing concessions; a hard lesson the U.S. learned when it exchanged arms with Iran for the release hostages held in Lebanon.[41] The hostages were released, then replaced with new hostages, and the dealings only provided later embarrassment for the Reagan administration.[42] There really is no sustainable argument that by 'not' negotiating concessions may only lead to larger groups of hostages taken in the future.[43] If concessions prove advantageous for the terrorist, either financially, or in the form of released prisoners, then there's nothing to say this would not provide a successful precedent for future incidents. Having said this, it seems apparent that the most beneficial long-term policy would be that of 'no concessions'. A nation, which relents to violent groups, only encourages like behaviour in the future.

A 'no-concessions' policy may also suggest the possibility of an armed assault. A state unwilling to negotiate will end the crisis on their own terms even if it means mounting an assault on foreign territory. While this was *not* a successful option for the U.S. in the *Achille Lauro* incident, it is, for example, a favoured tactic of the

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[40] For a greater discussion of this see: Philip Heymann, Terrorism and America, A Commonsense Strategy for a Democratic Society, (Cambridge, Massachusetts: The MIT Press, 1998), pp. 40-46. Herinafter, TERRORISM.

[41] See: Oliver L. North with William Novak, Under Fire, (New York: Harper Collins Publishers, 1991).

[42] Ibid.

Israelis, whose mixed-bag policy of no-concessions and negotiation are 'incident-dependent'.[44]

It has long been Israeli policy[45] toward hostage incidents in other than friendly, cooperative states that if there remains a possibility for a rescue attempt, no concessions will be made. And they have often mounted successful rescue attempts, such as in Entebbe.[46] However, if hostages are held in hostile territory, where no chance of a rescue operation is possible, then the Israelis will opt for negotiation. This has been rare, as it is a generally held belief that if the terrorist group succeeds with such tactics, then future threats will only follow. Which is likely to be true, especially in the case of Israel and their problems historically with terrorism.[47]

A policy of this sort is not without formidable risk. Realistically, only countries with the diplomatic and military capabilities to do so, can viably opt to mount a rescue operation. It would stand to reason that the U.S. then would be better apt to mount a hostage-rescue operation than to secure a 'no concessions' promise from a Host State. But the cards do not always fall that way. A rescue attempt is not likely to succeed if, for example, the Host State is sympathetic to the terrorist cause. Or, if the Host State is 'hostile' toward the U.S. Or, if the state is a sponsor of terrorism. In such cases, more likely than not, trade-off's will be made, *especially* if there is just no 'safe' way of dealing with the incident. This inherently creates a problem for decision-makers

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[43] TERRORISM, p. 40.

[44] Thomas Friedman, 'The Quandry for Israel', *New York Times*, June 22, 1985.

[45] See: Benjamin Netanyahu, Fighting Terrorism, How Democracies Can Defeat Domestic and International Terrorists, (New York: The Noonday Press, 1995).

[46] Anthony Clark Arend & Robert J. Beck, International Law and the Use of Force, (Routledge, 1993), p. 99

[47] Benjamin Netanyahu, FIGHTING TERRORISM, pp. 99-120.

that must weigh the cost of threat[48] against the cost of compliance,[49] and ultimately, how this effects the potential for future terrorist attack.[50]

5.2.2 The Art of the Deal

> *Reagan was "acting the part of John Wayne, a lone rider demanding Western justice." Fortunately, he said, "Washington operates on two wave-lengths: one of the president, who says 'Hold firm,' and the other of the back-channel bureaucracy, which is trying to work out a deal."*[51]

For U.S. decision-makers, an intricate series of 'non-negotiations' took place, only to shroud the deal that was 'not supposed to be a deal' at all. The U.S. did not want to give the appearance that the terrorists had succeeded, nor did they want to give the impression that targeting Americans could successfully pressure Israel.[52] Which would have been a dangerous message. This was communicated to the Israelis, after Israel had made it known that the Shi'ite detainees would only be released if the U.S. made a public appeal.[53] Israel then brought it's own policy back into focus, they would not release any of the Shi'ite's even if the U.S. publicly requested they do so.[54]

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[48] The problem is actually two-fold, the "threat and the reality. Anyone can threaten anything...[n]o capacity to carry out such a threat is required to make it. To make concessions without knowing if the capacity or willingness are there would invite wholesale repetitions and the cost that would come with them." Ibid. p. 44.

[49] "If the threat appears to be real, however, and the risk is catastrophe, it may be necessary to make the concessions." Ibid.

[50] "[T]he crucial problem is to make sure that the threat cannot be repeated by the same group again and again...any concessions should be followed by major steps to make sure that similiar extortion cannot be carried out by other groups." Ibid.

[51] Quoted from a senior Israeli official during the crisis. See: Russell Watson, 'The Hard Road to Freedom', *Newsweek*, July 8, 1985, p. 20.

[52] Ze'ev Chafets, 'Why the U.S. Was a Target', *New York Times*, July 3, 1985.

[53] Thomas L. Friedman, 'Israelis Say U.S. Must Ask If It Wants Shiites Released', *New York Times*, June 18, 1985.

[54] Thomas L. Friedman, 'Israel and U.S. Apparently Resolve Some Differences on Hostage Crisis', *New York Times*, June 23, 1985.

If the Shi'ite prisoners were released, it would have no connection to the TWA 847 incident. Further, Israel had no intention of speeding up the timetable for release of the hostages as part of a blackmail situation.

The Israeli position was a 'cat and mouse' game with their U.S. allies. Jerusalem was not about to place themselves in a position where the Reagan administration could publicly maintain their hard-line policy, and privately let Israel be coerced by mounting moral pressure to release the prisoners for hostages. This 'tension' had much to do with the context in which the hijacking occurred. The withdrawal of Israel from southern Lebanon, and the recent release of 1,500 Palestinian prisoners for three Israeli soldiers,[55] under Shi'ite pressure had received criticism from the Reagan administration. Israeli Prime Minister Shimon Peres was now eager to see how his U.S. counterpart handled a similar situation. Still, the Israeli's were not without praise for the U.S. on their firm stance against terrorism.[56]

Israel and the U.S. both publicly pursue strong counter-terrorism policy, and neither side was about to let the press push them into making a deal, then chastise them for doing so. Neither party was about to appear as if they were the one to stand down or make concessions. So what both the U.S. and Israel sought to accomplish was to keep their 'public face' while working privately to find a solution. The incident more likely impede any progress to release the Shi'ites. Israel was releasing them anyway, then halted after the hijackers demands and a glaring media focus placed them in a compromising position. Israel appealed to their own law to

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[55] Thomas L. Friedman, 'The Quandry for Israel', *New York Times*, June 22, 1985.

[56] Thomas L. Friedman, 'Israelis Say U.S. Must Ask If It Wants Shiites Released', *New York Times*, June 18, 1985.

determine how to proceed on the matter. Prime Minister Peres informed the Reagan administration:

1. If the hijacking had not taken place, we would have continued with a gradual release of the detainees, depending upon developments in southern Lebanon.
2. We have not set a timetable for their release.
3. In view of the hijacking, we are not inclined to do this in a way that would appear to give in to the terrorists.
4. Israeli law says that detainees may appeal to a board headed by a district judge.
5. As the result of such an appeal board decision, we have to release some thirty-one detainees next week.

It should be noted that one-third of the detainees are not Shiites, but Palestinian members of terrorist organizations apprehended in Lebanon.[57]

This meant very simply, that some would be released, some would not, in accordance with Israeli law and as if the hijacking never took place.

The U.S. had simultaneously been in contact with the Amal leader Nabih Berri,[58] who was involved with the hijackers on the ground and working as a middle man to try and end the crisis. Berri wanted to negotiate the release of all 766 Shi'ite prisoners,[59] clearly not an option for the Israeli's, but the Israeli's were not about to negotiate with Berri. So the U.S. would relay Israel's intentions to Berri, who would in turn relay Amal's intentions for the hostages to the U.S.[60] Using this method of

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[57] TURMOIL, p. 661

[58] Nabhi Berri was the Shiite Moslem Leader of the Amal movement who previously had a 'working' relationship with the U.S. and national secrutiy affairs advisor Robert McFarlane during the mediation of the Lebanese Civil War. Berri became the negotiator after receiving a committment from the hijackers that the hostages would not be harmed if their demands were met. Berri, who was also the Shi'ite Justice Minister, and prominent politician in Lebanon, was asked by the hijackers to be the negotiator. See: Nora Boustany, 'Jet Back Again; 31 More Released', *Washington Post*, June 17, 1985; Lou Cannon and Josh M. Goshko, U.S. Officials Pessimistic on Swift Release, *Washington Post*, June 18, 1985. Berri, who also claims part time residence in Deerborne, Michigan, is a very 'pro-American' guy - and was probably the best possible option to get the hostages released. See: Doyle McManus, 'Ghosts of Iranian Hostage Crisis Could Haunt U.S. in Beirut Standoff', *Los Angeles Times*, June 18, 1985.

[59] Bernard Gwertzman, 'U.S. Is Reported to Be Weighing Shiite Offer on Moving Hostages', *New York Times*, June 27, 1985.

[60] TURMOIL.

communicating allowed some form of dialogue to take place without anyone actually 'negotiating' for an outcome.

Reagan also turned to President Assad of Syria[61] to try and put pressure on Berri to end the crisis. This was a stretch for Reagan considering recent relations between Syria and the U.S. over the civil war in Lebanon[62] and especially since Syria's policy was openly supportive of terrorism.[63] Assad in turn sent an envoy to Beirut. The participation of Syria became the turning point of the crisis. Assad attempted to negotiate a guarantee for the release of all the Lebanese prisoners following the release of the TWA passengers. U.S. response was amenable to this as long as there was no linkage to the two events.

Secretary of State George Schultz spelled this out in a communication to Damascus:

> *It has been the position of the U.S. throughout this event that the hijacking and hostage taking is preventing the planned release by Israel of Atlit prisoners. Therefore you may inform the Syrians that the President believes that Syria may be confident in expecting the release of the Lebanese prisoners after the freeing of the passengers of TWA 847, without any linkage between the two subjects.*[64]

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[61] Doyle McManus, 'U.S. Wants 7 Beirut Kidnap Victims Released Also', *Los Angeles Times*, June 28, 1985.

[62] For background and discussion and analysis on this see: Joseph Fromm, 'Showdown With Syria', *U.S. News and World Report*, December 19, 1983, 'Lebanese Conflict - a -No-Win Situation for the U.S.', *U.S. News and World Report*, October 10, 1983 and Douglas Watson, 'In Lebanon, Hatreds Cloud Issues of Peace', *Ibid*; Rashid I. Khalidi, *Lebanon in the context of regional politics: Palestinian and Syrian involvement in the Lebanese crisis*, Third World Quarterly, vol. 7, July 3, 1985; Marius K. Deeb, *Lebanon: Prospects for National Reconciliation in the Mid-1980s*, The Middle East Journal, Vol. 38, no. 2, Spring 1984, *Policy Options in Lebanon*, Current Policy No. 536, United States Department of State, Bureau of Public Affairs, January 11, 1984; David M. Kennedy and Richard Haass, *The Reagan Administration and Lebanon*, Pew Case Studies in International Affairs, Case No. 240, 1994. See also relevant chapters in: Eric Hammel, The Root: the Marines in Beirut, (Orlando, Florida: Harcourt Brace Jovanovich, 1985); Caspar Weinberger, Fighting For Peace, Seven Critical Years in the Pentagon, (New York: Warner Books, 1990).

[63] Yohan Alexander, *Special Report - Syria, The Politics of Terror*, The World and I, February 1987, p. 16

[64] Ibid. p. 664. Emphasis added.

Syria's willingness to participate may have been predicated on the concern of the U.S. use of force to secure the prisoners. U.S. warships were looming off the Lebanese coast and there was growing speculation from Washington that the U.S. had not ruled out the use of force or retaliation.[65] Although there was no confirmation of this, Washington's relative silence on the matter was enough to spark some consideration. Incurring a military attack from the U.S. was not in Syria's best interest, or in the interest of other states in the region.

Assad assured Berri that his requests would be met, if he sent the hostages to Damascus, the Israelis would release the prisoners from Atlit. Serving in this capacity, Syria would in effect, resolve the crisis. This also meant that Assad was putting himself out on a limb by negotiating with Iran and Hezbollah leaders, which could have stung him later on if there was a last minute 'change of heart' for the hijackers. Still, the U.S. had technically, not made any deals.

Ultimately, the hostages were rounded up and shuffled to Damascus, where they were later released.[66] Hamadei and his accomplices were allowed to escape. Under intense media coverage, Assad basked in worldwide praise for Syria's role in ending the crisis.[67] In turn, Israel gradually released the Atlit detainees over several months. This was likely more of a stretch than Israel had planned, or than Berri had hoped for, but by dragging this out made the end result look like less of a deal.

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[65] George D. Moffett III and Peter Grier, 'Hijack confronted US and Israel with agonizing choices', *Christian Science Monitor*, June 17, 1985. See also: Bill Keller, 'Military Options Held in Reserve', *New York Times*, July 2, 1985.

[66] Russell Watson, 'The Hard Road to Freedom', *Newsweek*, July 8, 1985, William Chaze, 'Time for Weighing the Lessons', *U.S. News and World Report*, July 2, 1985; Richard Stengel, 'Sweet Land of Liberty', *Time*, July 15, 1985.

[67] Mary Curtius, 'How Syria extracted hostages from power struggle', *Christian Science Monitor*, July 1, 1985.

But why go through a deal at all? Despite public affirmation of a 'firm stance against terrorism', both the U.S. and Israel had a history of negotiating with terrorists. The recent swap of prisoners for Israeli soldiers and the previous three U.S. administrations were examples of this.[68] Most of the American public was just happy to end the crisis, regardless if Reagan had made a deal or not. The charade was less about accommodation than it was about establishing a pattern of behaviour. It was not in U.S. interest to contradict it's 'no deals' policy; nor was it in their long-term interest to bargain. But really, what happened here was that they did bargain, they did make a deal, they did abandon their policy, regardless if it wasn't done publicly. They did not resort to force, they did not attempt a rescue, and they did not use political or economic pressure. They were not in any position to. Once more, as hindsight shows us, the terrorists were not deterred from using the U.S. in the future as a target. And in the end, the terrorists went free. Whether or not it would have been to the United States advantage to stick to their 'no deals' policy is a matter of hindsight as well. A standoff, or holding out, could very well have cost the hostages their lives. A rescue effort could have proved disastrous. There is no tangible evidence here that says U.S. efforts would necessarily preserve U.S. credibility.

What all this shows us is, that context and crisis profoundly affect decision making to the extent that states are willing to abandon their way of thinking, at least behind closed doors. This is especially true when a country has no clearly established strategy for dealing with this type of an incident. What this illustrates with regards to preventing terrorism is that a prolonged campaign can generally bring about a

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[68] Rand-St. Andrews Chronology of International Terrorism, 1994.

relatively successful outcome, for the terrorist. In the end, Hamadei was successful. If U.S. intentions were to discourage future use of this type of tactic, then it would have to abandon concession making. But to disguise concessions as something else is embarrassing and ultimately ineffective and furthermore does not necessarily illicit cooperation.[69] The resolution of this incident had more to do with politically charged overarching efforts on a diplomatic level, not law, not strategy, and not force. Ultimately, the second half of this case, Hamadei's extradition, was not far removed from this same idea.

5.3 The Extradition of Hamadei

On 13 January 1987, nearly two years after the TWA 847 hijacking, customs officials in Frankfurt, West Germany arrested a Lebanese man carrying a forged passport under the name of Yousef Abdulkusser Rida.[70] This was after customs inspectors, who were likely tipped off by U.S. intelligence officials,[71] discovered he was carrying methyl nitrate, a substance similar to nitroglycerine, inside of wine bottles.[72] Fingerprints linked him as one of the suspected hijackers of TWA 847, and he was later identified as Mohammed Ali Hamadei, one of the three terrorists named

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[69] John K. Cooley, 'Hijacking emphasizes US need for friends in the third world', *Christian Science Monitor*, June 18, 1985.

[70] 'TWA Hijacking Suspect Arrested in Frankfurt', *FBIS*, 15 January 1987.

[71] David M. Kennedy, Torsten Stein, Alfred P. Rubin, *The Extradition of Mohammed Hamadei*, Harvard International Law Journal vol. 31, 1990, pp. 7-9.

[72] The suspect calimed he was unaware the wine bottles contained the explosive material, methyl nitrate - a similiar substance to nitroglycerine, that he was transporting them as a gift to a friend. See: Robert McCartney, 'Hijacking Suspect Arrested', *Washington Post*, January 16, 1987.

in criminal complaints issued by the U.S. federal court, charged with air piracy and murder.[73]

The United States Justice Department immediately drew up a provisional request for arrest, along with a communication to the West German government asking them to retain Hamadei until a formal request for extradition could be issued.[74] This was sent to the State Department, who wired it to Bonn, Germany where it was translated and delivered to the Foreign Ministry, in accordance with international legal procedure. The provisional arrest request formally establishes U.S. interest in Hamadei, if the Germans acted upon this request; it would not be possible to release Hamadei, which is exactly what the U.S. wanted. The U.S. inter-agency process worked round the clock making sure this was an airtight agreement, which followed international legal procedure to the letter. The U.S. even gave their assurance that the death penalty would not be sought,[75] thus eliminating any possible reason the West Germans might have for refusing extradition.

Under the principle of *aut dedere aut judicare*, West Germany had the legal right to refuse extradition, as is reflected by the West German-US Extradition Treaty.[76] West Germany also had a case for trying Hamadei under German charges of passport fraud and explosives smuggling. Also, under the universal law principle, West

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[73] Warrants were issued in July 1985 for Mohammed Ali Hamadei, Hassan Izzaldin, and Ali Atweh. A fourth man, Imad Mughniyah was also wanted, charged with the mastermind of the hijacking, but did not take part in the actual events. See: William Tuohy, 'Suspect Seized in Hijacking of TWA Jet to Beirut in '85', *Los Angeles Times*, January 16, 1987.

[74] Consistent with Article (3) of the U.S. West German Extradition Treaty.

[75] 'Death Penalty Issue Delays U.S. Extradition of Hijack Suspect', *Los Angeles Times*, January 17, 1987; Howard Kurtz, 'U.S. Waives Death For Hijack Suspect', *Washington Post*, January 19, 1987'; Marlene Cimons, 'Death Penalty Ruled Out in Hijack Case - Move by U.S. Helps Clear Way for Bonn to Extradite Lebanese', *Los Angeles Times*, January 19, 1987.

Germany could try Hamadei for the TWA offences if it chose to do so. Or, they could extradite him to the United States.

Following Hamadei's capture, West German business executive Rudolf Cordes was kidnapped from Beirut in apparent retaliation for Hamadei's arrest.[77] Days later a second West German businessman, Alfred Schmidt was abducted in Beirut as well and held together with Rudolf Cordes.[78] The kidnappers, believed to be connected to the Hezbollah,[79] demanded an exchange, the release of the prisoners for Hamadei.[80] Incredible pressure was now placed on the West German government. Despite diplomatic pressure from the United States to extradite,[81] West Germany, following a six-month deliberation, decided to try Hamadei themselves for murder and air piracy.[82]

The basis of the West German decision for rejecting the U.S. request for extradition of Mohammed Hamadei was predicated on the safety of the two West

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[76] The Treaty Concerning Extradition Between the United States and West Germany, June 20, 1978, 32 U.S.T. 1485, T.I.A.S. No. 9785. Hereinafter, EXTRADITION TREATY.

[77] Rudolf Cordes was the first West German to be abducted in Beirut, which first indicated the link between the arrest and the kidnapping. Since Hamadei's arrest, four attempts were made to abduct West German citizens in Beirut. See: H. Kurtz, 'U.S. Waives Death For Hijack Suspect, German Businessman Kidnaped in Beirut', *Washington Post*, January 19, 1987. See also: W. Tuohy, 'West German Businessman Seized in Beirut', *Los Angeles Times*, January 19, 1987.

[78] Abducted 3 days later on January 20, 1987.

[79] 'How TWA arrest spurred kidnappings', *USA Today*, January 26, 1987.

[80] 'The terror ante', *Albany Knickerbocker News*, January 28, 1987; 'Hostage Exchange?', *Washington Post*, January 29, 1987.

[81] 'Hamadei extradition bogs down', *Washington Times*, January 23, 1987; 'A test for West Germany', *Philadephia Inquirer*, April 6, 1987, 'Less Terrorism Talk', *Kansas City Times*, April 16, 1987; 'The Germans and the TWA Killer', *Washington Post*, May 28, 1987; 'Coordinating appeasement', *Washington Times*, June 12, 1987; William Tuohy, 'Bonn Clarifies Its Stand on Accused Lebanese Terrorist', *Los Angeles Times*, June 14, 1987.

[82] 'Bonn offers deal to Lebanese kidnappers', *Christian Science Monitor,* May 26, 1987; Serge Schmemann, 'Hamadei to Stay in Germany; Bonn to Try Him in Hijacking', New York Times, June 25, 1987. For U.S. reaction see: Leslie Maitland Werner, 'U.S. Appears to Concede on Effort To Extradite T.W.A. Jet Hijacking', *New York*

German hostages,[83] and the fear of further terrorist reprisals.[84] This is a very real problem for compliance when it concerns terrorist extradition. One year following the TWA incident, and a full year before Hamadei was actually captured, France had ignored a U.S. request to hold Hamadei. The U.S. petitioned France to detain and prosecute Hamadei after U.S. intelligence officials learned he was planning to enter France. French officials allegedly knew Hamadei was a member of a radical Palestinian group, but failed to make the arrest. This was likely based on France's continuing diplomatic efforts to try and secure the release of four French hostages in Lebanon.[85]

West Germany's legal position was if they were to try Hamadei for explosives smuggling the maximum sentence he could serve would be six years, after which he would still be available to the U.S. for extradition.[86] If they were to try him for air piracy murder, and hostage taking, he would be ineligible for extradition under the double jeopardy rule, which disallows a fugitive to be tried twice for the same crime.[87] By rejecting the U.S. request, Hamadei would likely face a less hostile trial in West

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Times, June 23, 1987; 'Meese, in West Germany, accepts decision on Hamadi', *Washington Times*, June 24, 1987; Steven V. Roberts, "No Deal' for Accused Hijacker, Bonn Assures', *New York Times*, June 25, 1987.

[83] 'Aide Says Threat Led Bonn To Bar Hamadei Extradition', *Washington Post*, January 27, 1988.

[84] 'West Germany's fear', *Norfolk Virginia Pilot*, June 25, 1987, p. 10. ; 'Lessons from a terrorist', *San Diego Union*, June 26, 1987, p. B-6; 'Aide Says Threat Led Bonn To Bar Hamadei Extradition', *Washington Post*, January 27, 1988; 'Bonn Fears Reprisals for Hammadi', *International Herald Tribune*, May 19, 1989.

[85] 'Paris Reportedly Ignored U.S. Request to Hold Hijacking Suspect', *Los Angeles Times*, March 15, 1986.

[86] Elizabeth Pond, 'Bonn expected to try Hamadei first, then decide on extradition', *Christian Science Monitor*, February 10, 1987.

[87] While dual criminality for the offence must exist for extradition to take place, in the case of nationals, there is not a requirement that would prevent charges from occurring in two separate states under the principle of nationality. There is currently, no existing international rule of *non bis in idem* or double jeopardy. See: Geoff Gilbert, Aspects of Extradition Law, (Doerdrecht: Martinus Nijhoff, 1991), pp. 98-99. As noted by L.C. Green, that because different states have different legal systems, however, the plea of double jeopardy cannot arise. See: L.C. Green, *International Crimes and the Legal Process*, International and Comparative Law Quarterly, vol. 29, p.

Germany than the United States. This was also politically beneficial for West Germany since the pressure exerted from Beirut was to prevent Hamadei's extradition in the first place. This was the best alternative in light of the pressure for a 'hostage swap'.[88]

The West German decision to try Hamadei was not without merit, irrespective of the hostage incident. There were also arguments against Hamadei's extradition entirely, which could have been accepted, and his extradition prevented based on admissibility of evidence. Foremost of these arguments, was the case for political offence.

The political offence exception clause relates to offences, which are either 'purely' or 'relatively' political.[89] There need only a tenuous connection of political motivation toward an ordinary crime for an offence to qualify for this exemption.[90] In the absence of a treaty-based definition, the courts are free to develop their own interpretation, and supply their own doctrine.[91] The U.S.-West German Extradition

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567. The U.S. W. German Extradition treaty, however, does have provisions for double jeporady. See: EXTRADITION TREATY, Article (2).

88 Hezbollah terrorists threatened to kill the two West German hostages if Hamadei was handed over the U.S.. See: N. Boustany, 'West Germans' Captors Praise Move by Bonn', *Washington Post*, July 9, 1987. See also: 'Hostage Exchange', *Washington Post*, January 29, 1987.

89 Extradition Treaty Article (4)

90 See: Antje C. Petersen, Extradition and the Political Offence Exemption in the Suppression of Terrorism, Indiana Law Journal, V. 67, No. 3, 1992; Goeff Gilbert, ASPECTS; M.C. Bassiouni, The Political Offence Exception in Extradition Law and Practice, Terrorism and Political Crimes no. 398, 1975; M. Kelly, The Political Offence Exemption to Extradition: Protecting the Right of Rebellion in an Era of International Political Violence, 66 Oregon Law Review 405, 1987

91 Catherine Currin, Extradition Reform and the Statutory Definition of Political Offence, Virginia Journal of International Law, Vol 24, 1984; Evans, Reflections Upon the Political Offence in International Practice, 57 American Journal of International Law 1, 1963; M. Whiteman, Digest of International Law, 1968; M. Cherif Bassiouni, Ideologically Motivated Offences and the Political Offences Exception in Extradition - A Proposed Juridicial Standard for a Unruly Problem, DePaul Law Review, Vol. 19, no. 2, Winter 1969; Kenneth S. Sternberg and David L. Skelding, State Department Determinations of Political Offences: Death Knell for the Political Offence Exception in Extradition Law, Case Western Reserve Journal of International Law, Vo. 15, 1983; Lora L.

Treaty supplies no definition of political offence[92] but allows each state to use discretion to apply its own qualification of political offence. Hamadei could easily claim the crime was part and parcel of a war of liberation against Israel and it's primary western ally, the United States. That his actions were aimed against foreign occupation of Lebanon, and the release of Lebanese nationals. If a German court ruled the offence 'political', there would be no option to extradite. And since there is no 'correct' definition of what constitutes a political offence, this argument would not be unfounded.

How this would be determined, however, would be a case for West German domestic law.[93] There are ways to 'limit the scope' of political offence, for example by specifically stating those offences which do not qualify for political exception. Under the Extradition Treaty, there exists a clause, which requires that 'Contracting Parties or the Requesting State have the obligation to prosecute by reason of a multi-lateral international agreement'.[94] This would apply specifically to the TWA 847 incident in terms of hostage taking.[95] In terms of hijacking, this is also mandated by

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Deere, Political Offence in the Law and Practice of Extradition, American Journal of International Law, vol. 27, 1933.

[92] Article 4(3) only specifies offences, which are not considered to be political, such as murder or 'willful crime' against "the life or physical integrity of a Head of State or Head of Government of one of the Contracting Parties, or of a member of his family". Also, if it is an "offence which the Contracting Parties or the Requesting State have the obligation to prosecute by reason of a multilateral international agreement."

[93] For analysis of issue decided in the domestic German courts see: HARVARD JOURNAL, pps. 22-23: '[T]he issue in domestic courts has been greatly influenced by the definition in the predecessor to the current IRG, the Deutsches Auslieferungsgesetz (DAG) of 1929....provided that the offence was political if immediately directed against the existence or security of a state....[a] related political offence was defined as one meant to support, prepare, further, secure, or conceal a political offence....[u]nder both definitions, the motive asserted by the defendant in not decisive, but it is a factor to be considered along with the objective nature of the offence.'

[94] Extradition Treaty, article 4(3)(b). See also, HARVARD JOURNAL at note 98.

[95] This would be covered specifically by the Hostages Convention of 1979. See: International Convention Against the Taking of Hostages, December 17, 1979, Hereinafter, HOSTAGES CONVENTION.

the Extradition Treaty to not include the political exception clause.[96] Whether this can in fact be applied to the murder of Robert Stetham, is a separate case.

It is arguable, that murder is not the same offence as hostage taking, or aircraft piracy, but in a separate category from these offences. Even under the Extradition Treaty, apart from the attentat clause,[97] (which cannot be considered as part of this case anyway), does not cover a provision for murder. Murder, per se, is not an offence that either West Germany or the U.S. have obligation to prosecute under any international multilateral agreement.[98] If Hamadei were successful in his bid for political offence, it does not imply that Robert Stetham's murder would not be considered a part of a political crime, however, it does not imply that it *cannot* be considered as such.[99]

The question is not whether Stetham's murder was *part* of hijacking, but whether it was *incidental to* the hijacking.[100] The latter, would require extradition or prosecution under the Montreal Convention for 'aggravated aircraft piracy'.[101] Still,

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[96] Article 4(3), which also refers to Hostage Taking.

[97] The attentat clause is defined as a provision, which covers an attempt on the life of a Head of State, and is not considered a political crime for the purpose of extradition.

[98] This exact point is reiterated in the Kennedy, Stein, Rubin, article "The Extradition of Mohammed Hamadei", on page 24, ¶ 2, in a discussion of the West German view of the Hamadei case, and the rational behind whether or not to extradite.

[99] Ibid.

[100] Under both U.S. law and West German law, provide for wrongful death as a result of aircraft piracy. U.S. law imposes either life imprisonment or the death penalty for a crime committed where the 'death of another person resulted from the commission or attempted commission of the offence. See: 49 U.S.C. § 1472 (i)(l)(b), 1982. Under West German law, death must be recklessly cause by the offence. See: HARVARD JOURNAL, p. 25, and at notes 110-112.

[101] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, at Articles 1-7. Hereinafter, The Montreal Convention. See also HARVARD JOURNAL, at p. 24, '[D]ifficulty arises from the language of the Montreal Convention, which leaves to the Contracting States the task of defining in detail the offences punishable on board an aircraft in flight if that act is likely to endanger the safety of that aircraft. Stetham's murder was undoubtedly an act of violence and the aircraft

in light of the overlapping nature of domestic law –v- international conventions, it was open for Hamadei to argue that Stetham's death was actually an unrelated incident to the hijacking, and merely an incidental occurrence which happened *at the time* of the hijacking. This probably would not have been successful. If the request for extradition hinged upon whether or not murder was a political offence, it is more likely than not, that the act would have been judged as purely criminal since Robert Stetham was merely an innocent passenger.

Hamadei also had the option of using the 'military offence' provision found in the Extradition Treaty.[102] Much like the political offence clause, however, there is no real standing definition of a military offence. If the hijacking were to be viewed as part of a military act, then extradition would have been barred. However, it is unlikely, as a practical matter, this would have occurred under West German application of the clause.

Taking all of this into account, there was little chance that the U.S. would succeed in a bid for extradition for the murder of Robert Stetham. This is a relevant point. On the grounds of speciality,[103] a fugitive is prosecuted only for offences for which extradition is granted. If extradition were denied for any one of the charges

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was technically 'in flight'. Nonetheless...Stetham was shot while TWA 847 was on the ground in Beirut. It is at least arguable that this act did not endanger the safety of the aircraft.' And at notes 106-108.

[102] EXTRADITION TREATY, Article 5.

[103] The principle of speciality is accepted by all states as part of the basic ground rules for extradition. As defined by Geoff Gilbert:
"a fugitive shall only be tried in the requesting state for those offences for which e was surrendered. Any offence not disclosed in the request, which occurred before surrender is, thus, no longer capable of prosecution. Effectively, the fugitive receives immunity through the extradition laws. However, the principle of specialty goes beyond protecting the fugitive's rights. While it prevents a fugitive being requested for one offence and tried for another, it also upholds the contractual nature of the agreement between the tow states in that the requesting state has to accept that the asylum state has granted extradition for the specified offences and no others."
See: Gilbert, ASPECTS, p. 106.

against Hamadei, then the other charges pending would prove 'unextraditable' as well. The only exception would be on the charge of hostage taking alone, which under convention law, could not be denied.

5.3.1 Hamadei's Legal Status

West Germany handed down an indictment to try Hamadei,[104] but discrepancy regarding his age would determine if he was to be tried in a juvenile court since he was allegedly under 21[105] at the time the hijacking occurred.[106] The decision was predicated on two developments. First was the discrepancy in birth dates. Lawyers for Hamadei claimed he was only 16 at the time of the hijacking. Lawyers for the prosecution unearthed documentation, which showed Hamadei would have been 21 on the eve of the hijacking allowing him to be tried as an adult. Under West German law, a defendant is considered a juvenile between the ages of 14-18, at which point the maximum penalty sentence would be 10 years.[107] From 18-21,[108] the law considers a defendant to be a 'young adult', which carries a substantially greater amount of leniency afforded on behalf of the courts in terms of sentencing.[109]

Second, while the courts rejected the Defendant's claim to be only 16 years of age, it ruled that Hamadei was in fact under the age of 21 during the *planning* phases

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[104] 'W. Germany Indicts Arab in Fatal 1985 TWA Hijacking', *Los Angeles Times*, February 9, 1988.

[105] Serge Schmemann, 'Germans Send Hijacking Suspect In T.W.A. Case to Juvenile Court, *New York Times*, April 13, 1988.

[106] 'Hamadi, Age 23, To Be Tried as Juvenile', *Washington Times*, April 13, 1988.

[107] Ibid.

[108] Persons between the ages of 18 and 21 receive special treatment under West German law. See: R.J. McCartney, 'Lebanese Accused of Killing U.S. Navy Diver to Go on Trial', *Washington Post*, July 5, 1988.

of the hijacking. Therefore his actual age at the time the crime was committed was not taken into account, rather his age during the *premeditation* phase of the incident.

Were Hamadei to be found guilty in a juvenile court, the maximum sentence imposed would be 15 years, relatively short in comparison to the life sentence which his crimes would be punishable for if tried in an adult court.[110]

5.4 Legal Mechanisms in Place

There were several legal mechanisms solidly in place under which extradition could have occurred. The U.S.-West German Extradition Treaty, which was the primary document referred to, and the one which has immediate precedence. The Hague Convention, The Montreal Convention, and the Hostages Convention were also applicable to the incident, and which both the United States and West Germany were signatories to.[111]

5.4.1 The U.S. – West German Extradition Treaty

The relevant articles under the U.S.-West German Extradition Treaty are viewed here as divided into two categories. First, the conditions under which extradition can take place. Second, the procedures that are implemented through diplomacy.[112]

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[109] See: *Los Angeles Times*, April 13, 1988

[110] S. Schmemann, 'Germans Send Hijacking Suspect In T.W.A. Case to Juvenile Court', *New York Times*, April 13, 1988.

[111] Moreover, West Germany was the country which had initiated the hostage-taking convention at the U.N.

5.4.1.1 Obligation

The conditions that govern extradition rely on obligation. Both the obligation of the requested state to extradite, and the type of offence which require extradition, are subject to the Extradition Treaty. This is established in Article 1 of the Extradition Treaty, which agrees that when persons charged with an offence in one state are found in the other state, the requested state has an obligation to extradite.[113]

When the West German government detained Hamadei, the U.S. prepared a formal indictment against him as well as the other hijackers on the main charges of murder and air piracy, along with several other infractions of U.S. code.[114] On the basis of this, the U.S. satisfied the condition of obligation.

Article 2 of the Extradition Treaty defines extraditable offences. Under the treaty, the offences described within the Article are punishable by the laws of both

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[112] Mark A. Synnes, The Attempted Extradition of Mohammed Hamadei: Discretion and the U.S.-West German Extradition Treaty, Wisconsin International Law Journal, 1989, p. 133

[113] Article 1 of the treaty states:
The Contracting Parties agree to extradite each other subject to the provisions described in this Treaty persons found in the territory of one of the Contracting Parties who have been charged with an offence or are wanted by the other Contracting Party for the enforcement of a judicially pronounced penalty or detention order for an offence committed within the territory of the Requesting State.
When the offence has been committed outside the territory of the Requesting State, the Requested State shall grant extradition subject to the provisions described in this Treaty if either.
its laws would provide for the punishment of such an offence committed in similar circumstances, or
(b) the person whose extradition is requested is a national of the Requesting State.

[114] Other violations include:
18 U.S.C. § 32(a), 1982; Destruction of aircraft or aircraft facilities
18 U.S.C. §113, 1982; Assaults within maritime and territorial jurisdiction
(a) Assault with intent to commit murder
(b) Assault with intent to commit any felony, except murder or rape
(c) Assault with a dangerous weapon, with intent to do bodily harm and without just cause or excuse
(f) Assault resulting in serious bodily injury
18 U.S.C. § 371, 1982; Conspiracy to Commit Offence or Defraud the United States
18 U.S.C § 1111, 1982; Murder
18 U.S.C. § 1203, 1982; Hostage Taking
49 U.S.C. App. §, 1982
(i) Aircraft Piracy
(j) Interference with flight crew members or flight attendants
(k) Certain crimes aboard aircraft in flight
(l) Carrying weapons, loaded firearms, and explosives or incendiary device aboard aircraft

contracting parties,[115] regardless of the category of the offence.[116] Extradition shall be granted in all cases where this applies, or prosecution will take place wherever the offence is punishable by both laws of the contracting parties.[117] Extradition must also be granted for attempts, conspiracy, or participation in extraditable offences.[118] Once extradition is granted for an offence, it is also granted with regard to any other extraditable offence that may not have been considered previously extraditable.[119]

Article (2) discusses as well, the requirement of a crime must qualify as punishable under the laws of both contracting parties for a minimum of one year.[120] Murder and air piracy are both crimes punishable for more than one year in both the U.S. and West Germany.

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[115] Article (2)
(1) Extraditable offences under this Treaty are:
(a) Offences described in the Appendix to this Treaty which are punishable under the laws of both Contracting Parties;
(b) Offences, whether listed in the Appendix to this Treaty or not, provided they are punishable under the Federal laws of the United States and the laws of the Federal Republic of Germany

[116] Article (2): In this connection it shall not matter whether or not the laws of the Contracting Parties place the offence within the same category of offences or denominate an offence by the same category.

[117] Article 2(2): Extradition shall be granted in respect of an extraditable offence:
For prosecution, if the offence is punishable under the laws of both Contracting Parties by deprivation of liberty for a maximum period exceeding one year, or
For the enforcement of a penalty or a detention order, if the duration of the penalty or detention order still to be served, or when, in the aggregate, several such penalties or detention orders still to be served, amount to at least six months.

[118] Article (3) Subject to the conditions set out in paragraphs (1) and (2), extradition shall also be granted:
(a) For attempts to commit, conspiracy to commit, or participation in, an extraditable offence;

[119] Article (4) When extradition has been granted in respect of an extraditable offence, it shall also be granted in respect of any other extraditable offence which would otherwise not be extraditable only by reason of the operation of paragraph (2).

[120] Treaty Article (2)

Under Article (4), offences cannot qualify under the political offence exception.[121] As discussed earlier, under the Extradition Treaty, Hamadei would most likely not qualify for political offence.

Article (12) is the death penalty clause.[122] As with any other extradition treaty, the Requested State has a right to refuse extradition if the death penalty is sought. The U.S. went to great lengths to insure that the death penalty would not be sought against Hamadei.[123] In addition to which it is a requirement of German domestic law to prohibit extradition to any country that seeks to use the death penalty.[124]

With regard to the above applicable treaty sections, it was clear that Hamadei fulfilled the conditions of obligation for extradition – meaning the charges definitely qualified as extraditable offences.

5.4.1.2 Procedure

The first step in almost any extradition proceeding, is the request for provisional arrest by the Requesting State.[125] This is an interim measure while the formal extradition documents are prepared. Pursuant to Article (16) of the Extradition Treaty,[126] where the guidelines for formal provisional request procedures are outlined,

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[121] Treaty Article (4)

[122] Treaty Article (12)

[123] See reference in note 75 in this Chapter.

[124] Ibid.

[125] Interview with Michael P. Lindeman, Assistant Director, United States Department of Justice, Civil Division, Office of Immigration Litigation, June 8, 1996. Hereinafter LINDEMAN-INTERVIEW.

[126] Treaty Article (16).

the U.S. would send a provisional arrest request through diplomatic channels via the Department of State and the Department of Justice.[127]

The actual request for extradition can only be made through the Department of State. All supporting documentation for violation of federal laws is compiled by the Department of Justice, and reviewed by the Office of International Affairs, before sent on to the State Department where an official extradition package is reviewed on both legal and political levels.[128] The actual extradition request is sent via diplomatic channels to the U.S. embassy of the requested state, where along with a diplomatic note is forward on to the Foreign Minister of the Requested State. Ultimately, it winds up before the Ministry of Justice for review and approval, along with all supporting documentation and evidence,[129] which is exactly the procedure used in the Hamadei case.

The final requirement, which must be satisfied, is a warrant for arrest issued by a federal judge of the Requesting State, of the alleged offender.[130] In this case, the United States District Court Judge for the D.C. Circuit signed Hamadei's arrest warrant. This would also require evidence of the laws of the Requesting State, which would demonstrate the severity of the offences applicable in both States, and which would qualify for extradition.[131]

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[127] LINDEMAN-INTERVIEW

[128] Ibid.

[129] Ibid.

[130] Refer to Chapter 1.2.1, *Extradition as a Process*.

[131] Ibid.

The final requirement of procedure under the Extradition Treaty is a summary statement of the facts of the case, under Article (3)(b). This was not a part of the Hamadei request, as the summary of the facts were accounted for on the actual arrest warrant, which is also permitted under Article (3)(b).

All of these requirements were quickly satisfied, and a formal extradition package delivered to the West German Ministry of Justice in Bonn, within one week after the arrest of Hamadei. The Head of the International Criminal Law Division in the Ministry of Justice commented that the conclusion was 'perfect' and that '[t]here was no legal reason not to have a quick decision.'[132] Still the request had to clear federal and state levels before a decision for extradition could be reached. The general guidelines here are that a state can decline a federal request, and visa versa. Frankfurt, in the West German State of Hesse, would review the extradition request in their High Regional Court, before making a decision and turning it over to the federal government. If the state declines extradition, the federal government can still file a request. If the state affirms extradition, the government can still refuse. In the end, the federal government will always have the final say, regardless of alternative interpretations of the Extradition Treaty.

Following the capture of the two West German hostages, the extradition proceedings were taken over by West German Chancellor, Helmut Kohl. Under Article (19) of the Extradition Treaty, which requires prompt communication of the decision, a conclusion was not reached on Hamadei for nearly six months. The hostage situation had cast a new light on the proceedings, and a special committee

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[132] HAMADEI EXTRADITION, note 1 at 6.

was formed by Chancellor Kohl, which superceded the extradition proceedings on all levels.

The next six moths ensued intense political dialogue between the U.S. and West Germany, followed by intense pressure by the United States on Chancellor Kohl for a quick resolution. The U.S. publicly supporting any eventual decision by West Germany, although it became clear within this time period, that the U.S. was probably not going to succeed in securing the extradition of Hamadei. Still, they were reasonably confident that West Germany was not going to release Hamadei either, but likely tried in Germany under the guidelines specified in Article (10) of the Extradition Treaty, the *aut dedere aut judicare* clause.

5.4.2 The Hague Convention

Obligations to extradite under the Hague Convention are covered in Articles (1), (4), and Article (8).

Article (1) describes the unlawful seizure of aircraft as an offence,[133] which the Hamadei case satisfies since TWA 847 was unlawfully seized by force. Article (2) refers to the conditions under which Contracting States makes the offence punishable by severe penalties.[134] Both contracting states have enabled this provision into their domestic law and therefore satisfy this condition. Article (3) refers to the jurisdiction of the aircraft with regard to the state in which it's registered.[135] Take off and landing

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[133] Any person who on board an aircraft in flight:
(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
(b) is an accomplice of a person who performs or attempts to perform any such act.

[134] Each Contracting State undertakes to make the offence punishable by severe penalties.

must occur outside the territory in which the aircraft is registered.[136] TWA 847 took off in Athens, and landed in Algiers/Beirut. This condition was also therefore satisfied. Article (4) requires a State to establish jurisdiction over the offence as applicable under the convention.[137] In the Hamadei case, this was actually satisfied under Article (3). Article (8) refers to the general condition of law, which the offence creates under the convention. The unlawful seizure of aircraft then, is considered an extraditable offence between contracting states that are signatories to the convention.

5.4.3 The Montreal Convention

Under the Montreal Convention, the relevant articles pertaining to extradition conditions are (1), (3), (4), (5), and (8).

Article (1) defines the offence with regard to unlawful acts against the safety of civilian aircraft.[138] As with the Hague Convention, the Hamadei incident clearly satisfied this condition. Article (3) requests that offenders under Article (1) make the

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[135] Article (3)§1: For the purpose of this Convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any suh door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

[136] Article (3) §(3): This Convention shall apply only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic fight.

[137] Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence.

[138] Any person commits an offence if he unlawfully and intentionally:
(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

crime punishable by severe penalties.[139] Again, similar to The Hague Convention, both the U.S. and West Germany satisfied this condition by enabling domestic legislation. Article (4), is the jurisdictional issue of the planes landing and take-off points,[140] which as established earlier, clearly satisfies this condition. Article (5), requests the appropriate jurisdiction over the offence take place,[141] and Article (8) requires that the offence be incorporated into the extradition treaty between the two contracting states.[142] Almost identical conditions to the Hague Convention, with identical results, the conditions all are satisfied under the convention.

5.4.4 The Hostages Convention

Articles relating to the conditions for extradition under the Hostages Convention are (1), (2), (5), and (10).

As with The Hague and Montreal Conventions, the Hostages Convention defines the offence of hostages taking under Article (1).[143] Hamadei certainly satisfies this

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(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

[139] Each Contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties.

[140] Article (4) § 2(a): the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of that aircraft; or
(b) the offence is committed in the territory of a State other than the State of registration of the aircraft.

[141] Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:
(a) when the offence is committed in the territory of that State;
(b) when the offence is committed against or on board an aircraft registered in that State;
(c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
(d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

[142] The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

[143] Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international

condition simply because the hijackers held the passengers and crew of TWA 847 hostage. Article (2) makes the act punishable by appropriate penalties.[144] Article (5) requires the contracting parties involved establishing jurisdiction through enabling legislation,[145] which Article (10) also discusses by incorporating the offence into the contracting states extradition treaty.[146]

Having satisfied the applicable conditions for extradition under all of the relevant treaties, as well as the obligation to extradite under the U.S.-West German Extradition Treaty, Hamadei was legally eligible for extradition.

5.4.5 Procedure under the Conventions

Under Article (6) of all three Conventions, is the requirement for the state where the offender is present, to be taken into custody if the conditions for extradition are satisfied,[147] which they were. The offender may only be taken into custody for as long as it takes for an extradition claim or procedure to be implemented, and that the

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intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking hostages ("hostage-taking") within the meaning of this Convention.

[144] Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences.

[145] Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:
(a) in its territory or on board a ship or aircraft registered in that State;
(b) by any of its national or, if the State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
(c) in order to compel that State to do or abstain from doing any act; or
(d) with respect to a hostage who is a national of that State, if that State considers it appropriate.

[146] The offences set forth in article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

[147] All three Conventions state at Article (6): Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the

state owning the registry of the aircraft be notified if these conditions are met. The Hamadei case did, in fact satisfy this condition by taking Hamadei into custody for prosecution.

Article (7) under the Hague and Montreal Conventions, and Article (8) under the Hostages convention,[148] refer to the *aut dedere aut judicare* option. If the offender is not extradited, the requested state is obligated to try him under their laws 'without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to competent authorities for the purpose of prosecution.'[149] The West German decision to try Hamadei in lieu of extraditing him to the U.S., satisfied this condition.

Article (10) under the Hague Convention, and Article (11) under the Montreal and Hostages Convention[150] refer to the mutual assistance in criminal matters obligation. Contracting states to the convention 'shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence. This was satisfied as the U.S. and West Germany cooperated completely throughout the request for extradition proceedings, and later in the criminal proceedings.

Still, this was not as clean-cut a decision as it should have been. The taking of the two West German hostages, and near six-month wait for a decision, made the

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law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

[148] The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

[149] Ibid.

process much more difficult than it should have been, especially when as many conditions were satisfied under several pieces of international legislation.

5.5 Conclusion

Unlike the *Achille Lauro*, which was anything but a success, Hamadei was a 'semi- victory' for the U.S. What the case shows us, is that when the stakes are high enough, States will concede to terrorist demands, especially under pressure and especially if it exonerates the potential for future attack. And that while domestic policy can alleviate diplomatic pressure, it does not solve the problem of terrorism, only holds it in abeyance. For the U.S. to claim victory they would have had to gained the opportunity to try Hamadei themselves.

Hamadei was tried and convicted on charges of murder and air piracy and received a life sentence,[151] the harshest penalty imposed under German law. When states opt to prosecute terrorists in their domestic courts, although it fulfils the states' legal obligation and reduces diplomatic tension, it does not necessarily lessen the threat of terrorism. If the accused terrorist is facing severe penalties, there remains the very real possibility of terrorist reprisals against the citizens or the state prosecuting the terrorist. This threat is significantly reduced, if the prosecuting state can assure the terrorist group that harsh penalties will not be imposed, that extradition will be avoided, and that in some cases, the terrorist will eventually be released.

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[150] Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in (Article 4 in the Hague Convention and Article 1 in Montreal and Hostages Convention). The law of the State shall apply in all cases.

[151] 'Life sentence for hijacker: judge explains background of terror and threats', *Frankfurter Allegemeine Zeitung*, May 18, 1989; 'Hamadei Gets Life for TWA Hijacking, Murder', *Los Angeles Times*, May 18, 1989; Robert McCartney, 'Hammadi Guilty In Hijack Killing Of U.S. Seaman', *Washington Post*, May 18, 1989.

International co-operation is not entirely abandoned here, but not entirely fulfilled either. Not allowing the terrorist to escape satisfies international legal responsibility, maintains good diplomatic ties with the victimized state, and maintains the prosecuting state's credibility within the international community toward thwarting terrorism. Allowing the threat of terrorism to maintain a controlling arm in the outcome, however, does international co-operation little good if it's merely a front to maintain a good behaviour standing. The only thing it accomplishes, really, is a 'feel-good' factor, knowing there was *some* justice, which is better than no justice at all.

The Hamadei example did not really hinder international co-operation. West Germany did hand down a stiff penalty – eventually. This took far longer than it should have for a near-perfect case, and the only reason Hamadei was not extradited was due to the hostage dynamic imposed after his arrest. The message clearly was to keep Hamadei out of the hands of the U.S. who had a strong desire to try Hamadei themselves. And it worked.

International co-operation is not abandoned if compliance is maintained. That's the face-value argument. The underlying 'thorn' is not compliance, but the degree of compliance, and this is something not easily controlled. While a state may choose the option to try, they will not necessarily choose the method or the punishment to fit the crime. Although Hamadei was given a life sentence, there still should have been no denial of his extradition.

It's not an easy trade-off to make, punish terrorists, or, protect your citizens. Both are in the interest of the state. But then what does this say about deterring terrorism? To make the claim 'we will punish terrorists' is fine, but if the terrorist

controls the extent to which you get to punish him, then it's an empty threat, and one that only politics and diplomacy can provide.

Still there is one final point of interest regarding Hamadei, and that is the environment in which it takes place. Up and to this point, both the *Achille Lauro* and the Hamadei examples deal primarily with Western governments. There is another dimension entirely when this issue applies to states that are not liberal democracies, that are not part of a bi-lateral or multi-lateral agreement, that are not amenable to negotiation; but that are the sponsors of terrorism. This creates an entirely different set of parameters when discussing the possibility of terrorist extradition, and the potential for compliance. And, there remain a variety of alternative responses which remain available to states as a response to terrorism, which require a more thorough examination

Chapter Six

State Sponsored Terrorism and the Rule of Law: Alternatives for Action and Their Impact on Extradition

> *"Let terrorists be aware that when rules of international behavior are violated, our policy will be one of swift and effective retribution."*[1]
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> *"Foreign policy is not therapy. Its purpose is not to feel good but to do good."*[2]

6.1 Introduction

Increasingly it is the case that regardless of the amount of international cooperation, or absence of political influence, or even the mounting evidence toward a particular group or individual, it simply may not be possible to achieve justice for acts of terrorism perpetrated. Such is the case, states must look toward alternative means of action in order to achieve the justice they so richly desire, and it is worth noting that point of justice, is not just about capturing those responsible, it is also about punishment.

This chapter is discussed differently from the previous two case studies, because it does not actually revolve around a single particular example. Unlike the previous case studies, it does not provide a single illustration in which to demonstrate a single topic such as *Achille Lauro*, which highlighted the importance of international cooperation, and the previous chapter, which underscored the rather poignant impact of political influence on extradition. The approach here uses the general topic to

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[1] Excerpt taken from remarks by President Ronald Reagan at the White House, January 28, 1981

[2] Remarks by Richard Haass, special assistant for national security affairs to fmr. President George H.W. Bush, and director of foreign policy studies at Brookings. Currently, Dr. Haass is the Director of Policy for the U.S. Department of State. See his remarks on sanctions in: "Sanctions almost never work", *The Wall Street Journal*, June 19, 1998.

illustrate a discussion of alternative legal measures to extradition in response to terrorism. Specifically in this case, as it applies to the issue of state sponsored terrorism, by taking into account what alternative measures become available, as a potential response to terrorism, which do not include extradition; such as the use of military force, sanctions, deportation, and even the possibility of civil action as well as the possibility of recourse to the International Criminal Court, which is no longer just an idea but an approaching reality.

State sponsored terrorism adds a new dimension to the problem since it deals with terrorist acts carried out by individuals and groups with the sponsorship and blessings of a foreign government which support the action, or with acts carried out by agents of the state. This creates problems on many levels, besides the obvious far-reaching political implications, it convolutes the effectiveness of legal response and draws attention to the possibility for alternate measures.

The prospect of state sponsored terrorism, however, is not a new problem – but an old tactic. History has demonstrated the advantage of encouraging and supporting violence by those rebelling against their enemy. The French supported the Americans in their Revolution of Independence against the British.[3] Centuries later, America would, in turn, provide support and assistance for civil insurgencies against the Soviet Union during the Cold War.[4] Involvement in Nicaragua, Angola, Afghanistan,[5] are

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[3] See: John R. Alden, A History of the American Revolution, (Da Capo Press, 1989).

[4] See: Donna M. Schlagheck, "The Superpowers, Foreign Policy, and Terrorism", in Charles W. Kegley, Jr., International Terrorism Characteristics, Causes, Controls, (New York: St. Martins Press, 1990), pp. 170-184.

[5] See: Benjamin B. Fischer "A Cold War Conundrum" History Staff, Center For the Study of Intelligence, CIA Monograph, 1997; Benjamin B. Fischer, At Cold War's End: U.S. Intelligence on the Soviet Union and Eastern Europe, 1989-1991, CIA Publication, 1999.

only some examples of how an entire state providing support can become a powerful ally against an enemy.

Governments themselves have also engaged in conduct, clandestine activities, or the use of terror, against their enemies. This is nothing new. Adolph Hitler, Joseph Stalin, Mao Tse-tung, all mastered the use of oppression for their own political gain, and created campaigns which encouraged the destruction of social and legal order. This system of terror for the purpose of political gain has not only transcended these regimes, but national borders as well.

The shift observed in terrorist trends from the 1970's to the 1980's went from individual terrorism and terrorist attacks toward state sponsorship of terrorism, motivated largely by a religious imperative,[6] enabling weaker states with a tool to wage war against a more powerful enemy. Such exportation of terrorism to sub-state groups by providing training, funding, or arms provides the necessary means to accomplish violent goals. Whereas trends indicate contemporary terrorist tactics have become more inventive; resources more readily available, and acts increasingly lethal[7] - the response by states has stayed much the same - a continual struggle to find an appropriate response to an extraordinary problem.

This presents a new challenge to states, which must search for ways to effectively counter terrorist acts that are state sponsored. As a result, states look to other methods of control, be it economic sanctions, diplomatic pressure, or flat-out military retaliation. The resort to international legal norms as they pertain to the use of force, or *jus ad bellum*, creates a paradigmatic shift in the context of how international law

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[6] Bruce Hoffman, Inside Terrorism, (London: Victor Gollancz Press, 1998), p. 161

operates. This has its own separate set of consequences for the state, for the international community, for the rule of law and extradition.

The first part of this chapter will address the definitional aspects of state-sponsored terrorism, how it acts to undermine the prospects for extradition, the options for response exercised by states, specifically in this section, the prospect of using force as an alternative for extradition.

The second part will examine the difficulties faced by international law, as pertains to state sponsored terrorism, as pertains to the use of force against state sponsored terrorism, and referring to specific case examples where this was the preferred method of response.

The third part of this chapter will review other alternatives to the use of force not including extradition. The invocation of sanctions, deportation, and the resort to civil action, are all alternatives to extradition.

6.2 Definitional Aspects

> *The definitions of terrorism are almost as prolific as its manifestations. The wags simplistically say "one mans terrorist is another mans freedom fighter." While there is an unfortunate degree of accuracy in this cliché, it does not really define terrorism."*[8]

The working definition and discussion of terrorism as it pertains to this study, was offered in Chapter One. For the purpose of discussion in this chapter, a brief examination of state sponsorship and how it adds a new dimension to the phenomenon of the problem is addressed. Ostensibly, how does legal response differ when the

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[7] Ibid. p. 189.

culprits are not rogue individuals acting in a lawless capacity, but with the blessings and support of an entire government? This section seeks to further the discussion on terrorism presented in earlier chapters, by examining specifically how state sponsorship engages the problem.

6.2.1 Nature of State Sponsored Terrorism

The watershed event which marked the emergence of state sponsored terrorism was the 1979 seizure of the U.S. embassy where fifty-two American hostages were held for 444 days by a group of militant Iranian students, who at the time were believed to be acting independently.[9] The students, as it was later revealed, were part of state-sponsored terrorist campaign directed by the Iranian Khomeini regime against the United States,[10] and which was only the beginning of what would be an extensive campaign against the U.S. by the Khomeini regime. This event accomplished two things. First, the incident marked the most serious act of modern state sponsored terrorism as experienced by the U.S. until that date. Second, it was the inspiration and influence for other pariah states to follow. The 1979 hostage crisis provided an important lesson to governments looking to expel western influence from the Middle East. Essentially, terrorist acts carried out under the sponsorship of foreign governments, was a cheap and effective means of waging war against a more powerful enemy and could be used covertly. As Bruce Hoffman poignantly observes:

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[8] Louis G. Fields, Jr., *Terrorism & the Rule of Law: Society at The Crossroads*, Ohio Northern University Law Review, vol. 6 no. 1, January 1979, pp. 52-59,

[9] Iran Hostage Crisis, The Columbia Encyclopaedia, Sixth Edition, (NY: Columbia University Press, 2001); Scott McLeod, 'Can Iran Be Forgiven?', *Time*, August 3, 1998.

[10] Hoffman, INSIDE TERRORISM, p. 186

"Acts of violence, perpetrated by terrorists secretly working for governments, were shown to be a relatively inexpensive and, if executed properly, potentially risk-free means of anonymously attacking stronger enemies and thereby avoiding the threat of international punishment or reprisal."[11]

The lesson learned from 1979 was that state sponsorship could greatly enhance the capabilities for smaller terrorist organizations with significantly limited resources by placing at their disposal the resources of an entire state.

This has an appeal on many levels. From a military standpoint, the use of training facilities, supply of arms and munitions can transform an otherwise amateur group of insurgents into a well-trained commando unit. Subsequent intelligence and logistical assistance are invaluable means for planning operations. Use of diplomatic pouches and embassies, government assistance for procurement of fraudulent documents, such as diplomatic passports and visas, assistance in the transport of weapons and explosives – elevate significantly the status of any terrorist operation.

Another element to this is fiscal gain. Terrorists who use such resources and act in a mercenary capacity are often well compensated for their work by pariah states. Ilich Ramirez Sanchez, alias "Carlos", is arguably the most notorious representative of such a profession.[12] Alternatively, such money is utilized in building terrorist organizations, turning an otherwise insolvent band of thugs into a highly organized, highly trained, well-endowed organization. Several Middle East countries noted for their sponsorship of terrorism[13] have employed The Abu Nidal Organization (ANO),[14]

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[11] Ibid.

[12] See: Christopher Dobson and Ronald Payne, The Carlos Complex, A Pattern Of Violence, (London: Book Club Associates, 1977); Colin Smith, Carlos Portrait of a Terrorist, (Mandarin Paperbacks, 1995).

[13] Iraq, Syria, Libya, and Iran are the Middle East Countries named as sponsors for terrorism by the U.S. Department of State. See: *Patterns of Global Terrorism*, U.S. Department of State Publication, 2000, hereinafter PATTERNS.

for example, founded by Palestinian Sabri al-Banna, who since 1974 carried out more than 90 terrorist attacks in 20 countries, killing or injuring almost 900 people, including the most lethal attacks against Rome and Vienna airports in 1985.[15]

The Japanese Red Army (JRA) is another example of a terrorist organization that made millions out of 'hired gun' terrorism.[16] Their splinter faction Anti-Imperialist International Brigades (AIIB), the outgrowth of a Qaddafi initiative designed to retaliate against the U.S. for the 1986 air raids, was one of their more lucrative deals. Qaddafi, fearing further U.S. retaliation, struck a deal with the JRA using AIIB as a cover for operations and attacks instigated and executed on Libya's behalf. And between 1986 and 1989, many such attacks were carried out by the AIIB with the blessing and support of Muammar Qaddafi.[17]

Perhaps the greatest appeal of state sponsorship is, for the terrorist, besides the dramatic increase in operational capabilities, and spectacular financial opportunities, there is little need to identify with the ideological or religious imperatives closely associated with terrorism, or even commonality with the sponsor's cause. Nor are they tied in to the local population or public opinion, which could drastically alter their need for support. Instead, the terrorist or mercenary group performs a deed for a price, and those deeds need match only with the foreign policy objectives of the sponsor. For the sponsor, the benefit is obvious; it's all about mission

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[14] The ANO has received considerable support, including safe haven, training, logistic assistance, and financial aid from Iraq, Syria (until 1987); continues to receive aid from Libya, in addition to close support for selected operations. *Ibid.*

[15] Ibid. Also; *North American Special Operations Group, Intelligence Resource Network,* http://www.nasog.net/intelligence/terrorists/Abu_Nidal_Organization.htm.

[16] PATTERNS

accomplishment. And the effects are not only bloodier, but also more destructive, and entirely more lethal.[18]

6.2.2 Level of Involvement

The nature of state sponsored terrorism must not only consider but draw the connection, or level of involvement, on behalf of government officials and the terrorist or terrorist group. By its very nature it is assumed that there exists a generally close level of involvement on behalf of the government and the group, which is spawned from a close ideological, religious, or political parallel between the two. This gives the terrorist group some legitimacy, since the direction of such support is aimed at funding, supply of weapons, use of land, resources, and intelligence for training, the terrorist group takes on the status similar to that of a trained militia, and not just a group of criminals. Such activity is not, by definition, an act of self-defense, but legally, as an act of aggression.

In their resolution defining aggression, the United Nations reiterates its view against terrorism in their Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,[19] which states:

> *Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph, involve a threat or use of force...Also, no State shall organize, assist, foment, finance, incite or tolerate*

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[17] Hoffman INSIDE TERRORISM, p. 192.

[18] Ibid. pp. 197-199.

[19] G.A. Res. 1186 (X11), 6 U.N. GAOR at 243 (1957), copy found in Ian Brownlie, Basic Documents in International Law, (Oxford: Clarendon Press, 1994), passage found on pg. 39.

subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another State, or interfere in civil strife in another State...[20]

This sentiment is echoed in U.S. Congress who suggest that state supported terrorism consists of acts which furnish arms, explosives, or lethal substances to individuals, groups, or organizations with the likelihood that they will be used in the commission of any act of international terrorism; providing direct financial support for the commission of any act of international terrorism; providing diplomatic facilities intended to aid or abet the commission of any act of international terrorism; or allowing the use of its territory as a sanctuary from extradition or prosecution for any act of international terrorism.[21] These are merely guidelines for determining whether or not certain activity can be considered state sponsored, not to be confused with actual criteria of what should be considered to be state sponsored.

Modern day state sponsored terrorism is a reality, and attacks have been increasingly prevalent in the past decade and a half.[22] The watershed attack which signified this emergence, and which garnered a significant amount of attention in the early 1980's was the October 1983 truck bombing of the U.S. Marine barracks in Lebanon, which killed 241 United States Marines.[23] The Islamic Jihad, a Shi'ite faction, claimed responsibility for the attack, and was later found to have been funded

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[20] *Ibid.* Annex at 338.

[21] S. 333, 96th Cong., 1st Sess. § 5(b) (1979).

[22] PATTERNS

[23] "Suicide terrorist driving truck loaded with 2,500 tons of TNT blows up US Marine Barracks", *The New York Times*, October 24, 1983. See also: Major Ronald F. Baczkowski, USMC, *Tactical Lessons for Peacekeeping: U.S. Multinational Force in Beirut 1982-1984*, (DoD publication), 1998. Six months earlier a similar attack had been carried out on the U.S. embassy in Beirut killing 69 persons. See: : US Multinational Force [USMNF] Lebanon, http://www.fas.org/man/dod-101/usmnf.htm.

and supported by the Iranian government.[24] Another example, the mid-air explosion of Pan-Am flight 103 in December 1988 over Lockerbie, Scotland that claimed the lives of 259 passengers, was linked to two Libyan intelligence agents, and was also found to have been bankrolled by Iran.[25] Throughout 1990's, the U.S. Department of State designated seven countries as sponsors of terrorism: Iran, Iraq, Libya, North Korea, Sudan,[26] and Cuba. These countries remain today on the list of State sponsors of terrorism, largely because no amount of economic sanctions or military retaliation have effected any change in their policies on terrorism.[27]

It is worth mentioning that while prevalent in the modern age, state sponsored terrorism is not a new or emerging trend, as noted earlier, this has all been done before. What calls attention to the issue, is when a powerful western democracy such as the United States falls victim to such activity, for several reasons, foremost being that this is actually a hard thing to do to a government such as the U.S. There exists a strong presence of law enforcement, intelligence, and defense mechanisms in the United States, terrorist actions are not *always* easy,[28] which is why foreign attacks on U.S. soil are negligible from a statistical viewpoint.[29] Still, it is an attack, a successful attack, in most cases, on a formidable opponent. Second, state sponsorship is a

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[24] Stansfield Turner, Terrorism & Democracy, (Boston: Houghton Mifflin Company, 1991), p. 165. The Islamic Jihad was also responsible for the U.S. embassy attack in April 1983.

[25] Refer to discussion of Lockerbie in Chapter 1.1.2

[26] Sudan was actually added in 1993. See: U.S. Department of State, PATTERNS, 1993.

[27] Hoffman, INSIDE TERRORISM, p. 191.

[28] Discussion with Dr. Arnold Kanter, former U.S. Deputy Undersecretary of State 1988-1992.

[29] Only one documented act of international terrorism on U.S. soil, which is the World Trade Center bombing in 1992.

legally defined act of aggression, and it must answer: to what end would State sponsorship accomplish, or, for what set of foreign objectives.[30]

Determining a level of involvement for state sponsored terrorism, needs to accommodate the following: proportionality, was the action of terrorism proportional to the response of the state, culpability, of the state, not the terrorist, and a sense of 'burden of proof' and confidence that this can be established, that the state, not the terrorist is truly culpable of the act. Finally, it must fall into one of the following classifications: first, was this merely the actions of a 'free lance' terrorist. Second, was this state sponsored to some degree, e.g. government-supplied munitions, training base, or sanctuary? Or, third, was it *state directed*, meaning was the attack an edict of a foreign government.

This last point makes all the difference in determining real culpability. For a state to 'turn a blind eye' to terrorist activity, i.e. training camps, smuggling rings, or sanctuary, does not generate the same response as a state sponsored mandate, even though it goes against all internationally accepted definition.[31] France is a perfect example of this, for years they held a sanctuary doctrine for terrorists. A gentleman's agreement of sorts which was basically understood as: so long as terrorist activity did not take place on French soil, against French citizens abroad or members of the French government, terrorists would be able to find a safe haven in France, free from prosecution or the possibility of extradition.[32] While ethically compelling, this technically is not the same as supporting and encouraging terrorism.

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[30] KANTER INTERVIEW.

[31] Ibid.

6.2.3 Response

When we examine the prospects of response, or the difficulties state sponsorship poses to response, there are numerous approaches when applied to the problem of terrorism. This is largely due in part to each government agency or organization's attempt to define the problem based on its own mission and purpose.[33] In an effort to try and treat the complexities of terrorism by distilling them into a unitary theme and a simple, universal symbol, the problem of definition is only exacerbated.[34]

To complicate matters further, the language found in international treaties contains definitions of certain acts as they pertain to particular crimes, even cases of state sponsorship. The Convention for the Prevention and Punishment of Terrorism, for example, defines terrorism as a criminal act directed against a state with the intention of creating a 'state of terror' in particular persons or the general public. Whereas, the Hostage Convention, the Montreal, and Tokyo Conventions, for example, identify special offences and the judiciaries responsibility for dealing with them. But internationally, the problem remains the same as before, whereas these attempts to define terrorism only allow for specified actions to be targeted as specific crimes,[35] and do not solve the definitional problem.

From the U.S. vantage point, different government entities also apply different guidelines for targeting what they deem to be a terrorist act, which does not further

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[32] See: RAND Monograph publication on-line: Ian O. Lesser, *Countering the New Terrorism, Implications for Strategy*, http://www.rand.org/publications/MR/MR989/MR989.Chapt4.pdf

[33] SUBCOMMITTEE ON SECURITY AND TERRORISM, COMMITTEEE OF THE JUDICIARY, 99th Congress, 1st Session, REPORT ON STATE SPONSORED TERRORISM 19 (Committee Print 1985), at 25. This problem is referred to as 'apparent in governments of the free world'.

[34] R. Cooper, "Terrorism: The Problem of the Problem of Definition", 26 *Chitty's Law Journal* 105, 1978, pp. 106-07.

explain the 'state sponsorship' phenomenon either. For example, the U.S. Department of State uses the definition of terrorism contained in Title 22 of the U.S. Code, that "the term 'terrorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience."[36]

The FBI definition classifies terrorism as "... the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[37] Which is different still from the U.S. Department of Defense definition where terrorism is "the calculated use of violence or the threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."[38] These are very general definitions, and unhelpful in formulating guidelines for punishment of terrorist acts. Furthermore, they do not pinpoint the types of terrorist acts covered, and against whom they are prohibited. And none of them are useful or even remotely helpful when applied to the problem of state sponsorship.

By and large terrorist actors, who participate as either individuals or in large groups, are generally categorized in terms of their strength of association to the

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[35] COMMITTEE REPORT, pp. 26-27

[36] U.S. Department of State, 1996 Patterns of Global Terrorism Report, Note: The term "noncombatant" is interpreted to include, in addition to civilians, military personnel who at the time are unarmed and/or not on duty. Attacks on military installations or on armed military personnel when a state of military hostilities does not exist at the site (e.g.: Khobar Towers bombing), are considered acts of terrorism by the State Department definition. The definition of terrorism contained in U.S. Code, See: *Title 22 of the U.S. Code, Section 2656f(d).*

[37] U.S. Department of Justice, Federal Bureau of Investigation Terrorism in the United States, 1997 - Report on Counterterrorism Threat Assessment and Warning Unit National Security Division.

[38] U.S. Army Field Manual 100-20, Stability and Support Operations - *Chapter 8: Combating Terrorism.*

state.[39] Which is inevitable in all cases of terrorism whether the state has an active or passive role.[40] But specifically state-sponsored terrorism will be categorized here as planning, direction, and control[41] on behalf of the state. While this appears as an oversimplification of state sponsored terrorism, the idea is to set the bar high enough to expose for discussion the degree of difficulty that governments' face as they continuously search for ways that effectively counters terrorist acts, and how state sponsorship aggravates this.

Definitional ambiguity aside, the one true obstacle to response remains the lack of clear and attainable objectives on behalf of the victimized state. When acts of

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[39]In his 1989 Law Review article, Professor Antonio Cassese identifies six degrees association between states and terrorist actors:
terrorist acts by actual state officials;
state employment of unofficial agents for terrorist acts;
state supply of financial aid or weapons;
state supply of logistical support;
state acquiescence to the presence of terrorist bases within its territory; and
State provision of neither active nor passive help.
See: Antonio Cassese, *The International Community's 'Legal' Response to Terrorism*, International & Comparative Law Quarterly, 38: 598-599, 1989

[40]Professor John Murphy identifies twelve categories for identifying state involvement in international terrorism which he divides into two sub-categories: state support and state sponsorship.
State Terrorism;
Direct Support;
Provision of Intelligence Support;
Provision of Training (Specialized Terrorist and Basic Military training);
Provision of Diplomatic Assets;
Provision of High Technology;
Provision of Weapons and Explosives;
Provision of Transportation;
Use of Territory;
Financial Support;
Tacit Support; and
Rhetorical Support.
See: John Murphy, State Support of International Terrorism: Legal, Political, and Economic Dimensions, 1989, p.5

[41] Professors Anthony Arend and Robert Beck provide a distillation of these criteria for state sponsorship and state supported terrorism which they reduce to four criteria:
terrorist actors without state toleration, support for sponsorship;
terrorist actors with state toleration, but without state support or sponsorship;
terrorist actors with state support, but without immediate state sponsorship; and
terrorist actors with state sponsorship
See discussion on comprehensive typologies with reference to Professors Cassese and Murphy in: Anthony Clark Arend & Robert J. Beck, International Law and Use of Force, (London: Routledge, 1993), pp. 139-142.

terrorism occur, the goals are not as seemingly clear as 'punish and deter', ultimately the prospects of 'retaliate and revenge' ring truer. The goal of any government is to protect its citizens; this has been said repeatedly. How they protect their citizens is usually a reflection of what the government is protecting them from. As it was quoted in the opening chapter of this work, "government is most dangerous when it claims to be fighting dangerous enemies"[42], nowhere is that more prevalent than in the face of terrorism. State response plays to the heat of the moment, to the politically expedient, to the praise of the press and it's citizens, but rarely ever to a long term, common sense, and focused approach to the problem. If there was a clean and simple answer or explanation for this, there probably wouldn't be a need for a thesis, or any of the other countless works aimed toward solving the problem. Terrorism is, by design, geared toward generating emotion. Terrorist attacks are significant emotional events. Response does not divorce itself from emotion either, and in the fury of emotion, we look for justice, which is different than looking toward the law. Law has, as we have observed painfully through previous chapters, plenty of answers. What we are looking for as victims is a way to even the score. Sometimes law vindicates this, if it can be properly applied and enforced. Extradition is one way, but as we've seen, only if the terrorist can actually be caught. International cooperation is another, in fact mandatory, way of bringing a terrorist to justice, especially if it involves an extradition case, but there are more facets to this, and the problem is not as cut and dry. States also respond by fighting 'dirty', or as they may see it, 'fighting back'. This becomes a particularly desirable option if it is couched as a pre-emptive strike or

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[42]Philip B. Heymann, Terrorism and America A Commonsense Strategy for A Democratic Society, (Cambridge, Massachusetts: The MIT Press, 1998), pp. xi-xii.

an act of self-defense, technically justifiable under international law and rules of engagement, and aimed at the real enemy, which sometimes is not the terrorist, but the state that harbors them.

6.3 The Challenge to International Law

> *"This will be a long ongoing struggle between freedom and fanaticism...between the rule of law and terrorism"*[43]

As it has been examined in previous chapters, difficulties arise even with countries with whom extradition treaties exist, and in the case of terrorism, no case is ever considered cut and dry. The assumption to this point has been that governments share a common ideology in fighting terrorism and common legal ties when bringing terrorists to justice, it has not yet been discussed what would happen if they did not. If the terrorist escapes to a state with no such bonds, and consequently no extradition or mutual legal assistance treaties, then cooperation will depend largely on the harbouring states attitude toward the group or individual seeking refuge. If the state providing sanctuary to the terrorist is a supporter of the group or sponsor of the action, then response for the victim state becomes increasingly difficult and presents challenges to international law.

In a 1984 speech before the Jonathan Institute, Secretary of State George Shultz made the assertion that although passive measures were necessary, even helpful, in the prevention of terrorism, the time had come to "think long, hard, and seriously about more active means of defense...through appropriate preventive or preemptive actions

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[43]President Clinton's address to the nation following the bombings on Sudan and Afghanistan, August 20, 1998.

against terrorist groups before they strike."[44] Similar sentiment echoed by President Ronald Reagan in his speech a year later, to the American Bar Association, where he asserted that countries which sponsor terrorism were committing "acts of war against the government and people of the United States"[45] and that "under international law any state which is the victim of acts of war has the right to defend itself".[46] Presidential rhetoric aside, the concept dubbed the "Shultz Doctrine", espoused the scholarship of use of force as self defense against terrorism, and chronicled it as a right of international law. "[B]y providing material support to terrorist groups which attack U.S. citizens", Reagan argued in a 1986 news conference, "Libya has engaged in armed aggression against the United States under established principles of international law, just as it had used it's own armed forces."[47]

International law concerning the use of force partly derives from treaties, partly from custom and practice and partly from the UN Charter and from multilateral conventions and agreements such as with arms control and disarmament agreements. The United Nations Charter established more than just an institution for an international organization whose mission is to manage international conflict – it established an international legal framework. Beyond "institution creating" it was "norm creating" and set out specific rules governing specific behaviour including the role of states as it pertains to the use of force.

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[44] Secretary of State George Shultz, "*Terrorism: The Challenge to the Democracies*", address before the Jonathan Institute's second annual Conference on International Terrorism, June 24, 1984, printed in *Department of State Bulletin*, August 1984 issue, p. 33.

[45] President Reagan's Remarks at the Annual Convention of the American Bar Association, July 8, 1985

[46] Ibid.

[47] President Reagan's News Conference, January 7, 1986

Article 2(4) of the United Nations Charter is the general prohibition on the use of force and provides:

> *All members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.*[48]

The proscriptions established by Article 2(4) prohibits use of force or threat of the use of force as it pertains to another states territorial integrity or political independence and specifically as it falls within the parameters of interest within the United Nations. This also would prohibit use of force 'short of war' if they were inconsistent with the purposes of the United Nations.[49] Article 2(4) allows for several exceptions to the Moratorium on force, and which follow the prohibition of the use of force except in cases where:

- Force is used in self-defense[50]
- Force is authorized by the United Nations Security Council[51]
- Force is undertaken by the five major powers before the Security Council is functional[52]

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[48] UN Charter 2(4)

[49] See: Arend, FORCE at note 5, p. 30

[50] Article 51 refers to individual and collective self defense and provides:
Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[51] Chapter VII, specifically Articles 39-51 refer to Action with Respect to Threats of Peace, Breaches of the Peace, and Acts of Aggression. Article 39 specifically empowers the Security Council to determine the "existence of threat, breach of the peace or act of aggression". If determined so, the Council under Article 42 may order members of the United Nations to use force against the state.

[52] Article 106 refers to the collective use of force before the Security Council is functional and provides:
Pending the coming into force of special agreements referred to in Article 43…as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration [U.S., Britain, U.S.S.R, China] and France, shall… consult with one another and as occasion requires

- Force is undertaken against the enemy of states of the Second World War.[53]

To appreciate what this means, it is significant to first remember what the United Nations Charter and Article 2(4) were meant to do in the first place, which was to transform the post WWII world by readvocating what the tolerable levels of force would be acceptable to the international community. This was not designed to include the threat of terrorism, but the use of force by states.

Methods of violence against states or foreign nationals propagated by either individuals or organized groups for advancing a particular political purpose were never part of the original design, nor did the charter design fully provide the tools for the legal accountability for terrorists or terrorist acts. If overt acts of terrorism are to be considered equivalent to armed insurrection in terms of response, then they must be grounded by a legal status. This is not the case. There are no solid international remedies for terrorism, and international law has many gaps on paper and in practice often grants immunity to terrorists, and as observed by Victoria Toensing:

> *The United Nations cannot enforce peace; it can only lessen hostilities. It possesses no mechanism for controlling terrorism...[n]o international body deals effectively or comprehensively with terrorism. As soon as we accept that proposition, we can consider forming another type of alliance where states opposing terrorist violence can reach agreements when an incident occurs.*[54]

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with other Members of the United Nations with a view to such joint action on behalf of the Organization as many be necessary for the purpose of maintaining international peace and security.

[53] Articles 107 and 53 pertain to force against enemy states, with relevance to the enemy states of WWII. Article 107 maintains:
Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

Under Article 53, the Security Council does not need to authorize any members against an enemy state and:
Provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression.

[54] Victoria Toensing, *The Legal Case for Using Force*, in Neil C. Livingstone and Terrell E. Arnold eds., Fighting Back: Winning the War Against Terrorism, (Lexington Books, 1986), p. 149.

The alternative for victim states is to redefine the problem, not as terrorism, but as an act of aggression. The response then becomes not a resort to legal interpretation or legal remedies, but an act of self defense, which are precluded in the politics and purpose of the United Nations interpretation of allowing self defense to be construed to include the historical notions of that term. The UN position is and has always been that 'violence begets violence' and reaction by force would only perpetuate that violence. This is not entirely wrong; however, those who are in the business of terrorism are unchecked, and operate outside this system. As a result, violence will almost certainly continue, but in all likelihood it will be the terrorist who perpetuates it.

6.3.1 Legitimizing Use of Force

> *Nunquam decurritur ad extraordinarium sed ubi deficit ordinarium – Never resort to the extraordinary until the ordinary fails.*

The use of force for self-defense may at times be the only possibility available to states. By definition, terrorism is something conducted from the shadows, by an enemy difficult to identify, and harder still to catch - not in the spotlight. However, it is a different situation altogether when the enemy fires visible warning shots with a promise to follow-up with even more violence. In this instance, the case for a decision to use force is necessarily predicated on the question: 'what threshold of evidence must be established before a counterattack is justifiable?' One illustration of this are threats which affect the safety of all American citizens, such as the case with

Osama bin Laden, who openly declared war on all Americans and Jews, and that he would not distinguish "between those dressed in military uniforms and civilians"[55], in order to dissuade Western influence from the region. The fatwa issued by Bin Laden openly expresses that the U.S. "will leave when the bodies of American soldiers and civilians are sent home in wooden boxes and coffins",[56] and makes no secret of goals or methods, rather it is an open declaration of war by an organization dedicated to killing American citizens. When Bin Laden exercised this philosophy by bombing the U.S. Embassies in Kenya and Tanzania, it is not far fetched to understand and even offer legitimacy to the response, which was "we have an obligation to hit them, and if necessary to keep hitting them, until they lose all of their ability to hurt Americans."[57]

The use of force as pure retaliation, however, has a different meaning. Retaliatory force sends a message, a strong one that says, "you hit – and we'll hit back – no matter where". For countries such as Israel where the stakes are high, an "eye-for-eye" policy is carved more so out of a need for survival and credibility than it is for mere saber rattling or politicking. For a superpower such as the U.S., terrorist attacks take on a different face than those waged against Israel, or other nations for that matter, and retaliation may not serve well as a deterrent.

As history has shown, retaliation does little more than perpetuate the justification of terrorism to terrorist organizations, or the states which sponsor them. Does this justify military retaliation in some cases and not others? Not necessarily, but it can not be completely discounted either.

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[55] "In Self-Defense", *The Washington Post*, August 21, 1998, p. A22.

[56] Ibid.

[57] See comments of Speaker Newt Gingrich, *Ibid.*

There are problems that go along with using force, foremost being the target. Terrorist engaged in choosing targets do not necessarily discriminate between military or civilian targets, but retaliatory strikes do. It's a fundamental understanding that military force is not used against civilian targets even if you declare war, as it is against the Geneva Conventions to do so. A 'war on terrorism' notwithstanding, mainly targets military-type training installations or those installations which promote or perpetuate terrorist means or activity. And although targeting military installations is the mission in most cases, the distinctive line between military and non-military targets is quick to blur, either by accident or by design.

There is also a question of legitimacy or burden of proof toward using force. Attacks used as retaliation are subject in part to timing as much as evidence. Rarely, if ever, is there an opportunity to retaliate against a terrorist attack 'in progress', the *Achille Lauro* incident notwithstanding. So retaliation is then based on evidence of terrorist activity or sponsorship, and which is assumed will be used against citizens of the state launching the retaliating attack. Another term for this is pre-emptive strike, and it's a huge leap – legally - from self-defense. Retaliation must be founded on fact, which means standards of evidence are relatively high. Terrorism, however, is a very different kind of fight from traditional rules of engagement on warfare – it is an increasingly irregular war, where nihilism replaces politics and sponsorship has become more and more hidden. This is by design, and this changes the rules of engagement. So naturally the rules of retaliation and burden of proof are equally questioned as to whether or not they are fair standard bearers. Should the rules be changed and the standards lowered when the objective is terrorism? Rules are placed for a reason. And if the rules are changed, or standards lowered, then it must be

observed that way for all that participate by way of law in the international community, not just those players who are strong enough to carry out the fight. It's a dangerous precedent otherwise.

Bearing in mind that whether or not force is used is not as important as what it is used it for. Meaning, is there a real objective? Self-defense or intervention to protect nationals, are all challenges to fundamental international law, but arguably justifiable under certain circumstances, but they are not real objectives. For the use of force to be justified as legitimate counter response depends not only on the circumstance, but compelling evidence supporting the effort, the amount of force used, the target, and what hopes to be achieved, for it to be a compelling case for legal and ethical justification. The use of force to defeat terrorism is not an overall compelling argument for the use of force. Sadly, nor would it work.

Lastly, it should not be discounted that these things do fail, and on many levels. As in any game of hardball, participants should refrain from involvement unless they are willing to lose, and lose big. And occasionally, they do. The 1979 failed Iranian-hostage rescue attempt on behalf of the United States is one rather poignant example. But the spring of 1996 when Israel launched major air, sea, and artillery attacks on Lebanon in retaliation for Katyusha rocked attacks and in an aim to force Syria to restrain Hezbollah guerrillas is probably a more accurate one. A targeting mistake tragically killed over a hundred Lebanese women and children seeking refuge in a UN base. The death and destruction did nothing more than garnish further support for the Hezbollah, create outrage amongst the international community as well as Israel's allies. Had Israel launched a direct strike at Syria, it would have been an act of war

unjustifiable based on Syria's support of Hezbollah actions in Lebanon. But to launch an indirect strike did nothing more than weaken Israel's position and credibility.

As there is no clear indicator of winning by using military force, it makes it nearly impossible to define success. A militarily successful attack is not necessarily a battle won, it is considerably more politically, and morally, complicated than that, and there are many others areas where loss is incurred. Often times retaliation risks the lives of innocent people in order to make a point with their leaders. In the process, manage to generate powerful opposition as well as fear. From a purely definitional standpoint, retaliation is not much different than terrorism. Hence the need for a clearly defined end game to what specifically the use of force for retaliation is meant to achieve, otherwise, it's an arbitrary, objective less, and often unilateral, show of force, but nothing more. Consider the following examples:

- *Libya – Operation El Dorado Canyon*

  On April 14,1986, U.S. President Ronald Reagan ordered a military attack on Libyan president Colonel. Momar Qaddafi – Operation El Dorado Canyon - as retaliation for Libya's involvement in a terrorist attack on a West Berlin nightclub which served as a popular hangout for American servicemen, and which had killed two persons and wounded 200 others.[58] The two U.S. air raids and the subsequent bombings of Tripoli and Benghazi resulted with thirty-seven fatalities, including Qaddafi's two-year-old stepdaughter, and ninety-three injured, including two of Qaddafi's sons. The attack was clearly aimed with the objective

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[58] See news reports: http://www.libyanet.com/0401nwsc.htm; *Passport to Terrorism in the Middle East*, http://www.mrdowling.com/608-terrorism.html.

"get Qaddafi", moreover, it was the first clear message that the U.S. was willing to retaliate against terrorism, with force if necessary.

President Reagan explained these actions as a result of 'direct proof' of Libyan involvement in the West Berlin attack. Furthermore, the U.S. possessed 'solid evidence' that Colonel Qaddafi was planning other attacks against the U.S. installations and citizens. "Self defense", explained President Reagan, "is not only our right, it is our duty."[59]

The result was negligible. Despite rhetoric that Libya had learned it's lesson and Qaddafi was now silenced – just the opposite was true. Less inclined to be open about what activities Libya actually took part in, an effort to deter future retaliation, Qaddafi's entire operation took on a more clandestine front while continuing to support terrorism.[60] In addition, there was almost universal criticism of the U.S. for the attack by friends and foes alike. Ultimately the UN General Assembly issued a condemnatory resolution against U.S. actions.[61]

- *1973 and 1986 Israeli Aircraft Interceptions*

On August 10, 1973, Israeli military aircraft intercepted a Middle East Airlines flight carrying ninety persons en route from Beirut to Baghdad, and forced it to land at an Israeli military base. Israeli authorities claimed they had reason to believe there were Palestinian terrorists aboard, and had subsequently

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[59] Ronald Reagan's speech as reprinted in US Department of State Bureau of Public Affairs Special Report No. 24, 1986, vol. 1.

[60] Turner, DEMOCRACY

[61] See: *New York Times* articles on April 16 and 22, 1986.

disembarked and questioned all the passengers. Once the Israelis were satisfied there were no such terrorists aboard, they allowed the flight to leave.

Again, in 1986 the Israeli's launched another attempt under the same *modus operandi*. On February 4, 1986, Israeli fighters intercepted a civilian aircraft bound from Libya to Damascus, forcing it to land in Israel. After again questioning the passengers, it was determined that the terrorists they sought were not on board. Again, they allowed the flight to leave.

The UN Security Council condemned both actions. Each time the Israeli delegate defended Israel's right to use forcible action as a permissible form of self-defense,[62] and the inherent right to protect its citizens from a terrorist attack[63] -making the case that acting outside the parameters of the law is acceptable when you're dealing with individuals or groups which operate outside these parameters as well. Both times, the international community expressed profound disapproval.[64] Except for the United States, who interestingly enough changed its position from 1973[65] to 1986.[66]

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[62] See both: UN SCOR, 178th Mtg., 35 UN Doc. S/PV.1738 (1973), and UN Doc. S/PV. 2651, February 4, 1986.

[63] The Israeli's argument was that in the age of terrorism the term self defense must be applicable when a nation is attacked by terrorists even if it means using pre-emptive action. See: *Ibid*: *1986*.

[64] In 1973, the international community unilaterally condemned these actions. In 1986 – the Security Council debated adopting a resolution condemning Israel. Ibid, 1973 & 1986.

[65] The U.S. position in 1973 as voiced by Ambassador John Scali, who argued that the commitment to the rule of law in the international community must be upheld. That Israel's action was entirely unjustified and could only bring about further terrorist strikes. Ibid, 1973.

[66] The U.S. position had changed dramatically by 1986. U.S. Ambassador to the United Nations Vernon Walters argued that while Israel's actions were "legally impermissible" due to unsubstantiated evidence, there exist exceptional circumstances where such actions are justified. That such state action is an inherent right of self-defense. The U.S. subsequently, was the only member of the Security Council to support Israel. See: Ibid., 1986. One contributing factor toward this change in position may likely be the fact that the U.S. was not a target of any real terrorist attacks in 1973 and had no real policy or position with regard to terrorism. This had changed completely by 1986 when the U.S. certainly became a target of terrorist attacks.

- *1985 Israeli Tunis Raid*

On October 1, 1985, Israel launched an air strike on PLO headquarters in the Borj Cedria suburb of Tunis, which killed or injured more than a hundred people.[67] This was mostly in retaliation for an attack, which came one-week earlier when Palestinian terrorists killed three Israelis in Larnaca, Cyprus.[68] Israel's justification for the attack was to strike at the heart of the PLO, specifically "those who make the decisions, plan and carry out terrorist activities."[69] The argument followed that since Tunisia had allowed it's territory to used as a home base for terrorist training and operations, they were a legitimate target for armed action equivalent to the same extent of damage, and potential damage to that inflicted upon Israel by the terrorists.[70]

Not surprisingly, the UN Security Council passed Resolution 573 condemning Israel's use of armed aggression, supported Tunisia's right to reparations and demanded Israel refrain from further such acts.[71] The United States abstained from voting, but did not entirely condemn the act noting that the U.S. recognized Israel's action as a legitimate response of self-defense.[72] Less than a week later, Palestinian terrorists hijacked the cruise liner *Achille Lauro*, a result of a botched

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[67] "Israeli Planes Attack PLO in Tunis, Killing at least 30, Raid 'Legitimate', US says", *New York Times*, October 2, 1985.

[68] 'Three Israelis Slain by Palestinians in Cyprus', *New York Times*, September 26, 1985.

[69] 'Israel Calls Bombing a Warning to Terrorists', *New York Times*, October 2, 1985.

[70] Ibid.

[71] UN Doc. S/PV.2615 (1985)

attempt at a raid on an Israeli port, but nevertheless ending in the death of an American citizen, Leon Klinghoffer.[73]

- *U.S. Attacks on Afghanistan and Sudan*

On August 20, 1998, American cruise missiles struck targets in Afghanistan and Sudan.[74] The target in Afghanistan was identified as an extensive terrorism training complex.[75] U.S. officials said that the United States had convincing evidence that the organization of Osama Bin Laden, the Saudi born financier of a network of Islamic terrorists, and self proclaimed leader of a holy war against the U.S. was responsible for the bombings of the U.S. embassies in Kenya and Tanzania on August 7, 1998.[76] And that a meeting of members of an international terrorist network he supported was imminent at the Afghan site when the missile attack occurred.

The Sudan target, was a factory that American officials said made a precursor element used in the production of VX, a potent nerve gas. Sudanese officials denied this stating that it was merely a pharmaceutical plant.[77]

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[72] Ibid. See remarks from 40th meeting.

[73] The result also included the U.S. taking a page from the Israeli's book on use of force, when U.S. Tomcat fighters forced down an Egyptian airliner onto Italian territory in an attempt to abduct the terrorists.

[74] More than 60 Tomahawk missiles were fired at Afghanistan. See also: 'U.S. Attacks Based on Strong Evidence Against Bin Laden Group', *New York Times*, August 21, 1998.

[75] 'Afghanistan: Report Profiles Afghan 'Terror' Camps', *Paris: Al-Watan Al-'Arabi translated from Arabic*, 28 August 1998 pp. 22-28; 'U.S. Sees Bin Laden as Ringleader of Terrorist Network', *New York Times*, August 21, 1998.

[76] 'After the Attacks: in Sudan For This Islamic Tactician, Battle With U.S. Has Begun', *New York Times*, August 24, 1998.

[77] 'Possible Benign Use Is Seen for Chemical at Factory in Sudan', *New York Times*, August 27, 1998; 'U.S. Says Iraq Aided Production of Chemical Weapons in Sudan', *New York Times*, August 25, 1998.

Bill Richardson, the U.S. Ambassador to the United Nations, claimed the attacks were carried out only after repeated efforts had been made to convince the Sudanese government and the Taliban regime of Afghanistan to cease their cooperation with the Bin Laden organization.[78] In his national television appearance President Clinton described the acts as self-defense and retribution for the bombings of the embassies in Kenya and Tanzania, attributed as the work of Bin Laden, and that these targets were "associated with the Bin Laden network". "Afghanistan and Sudan", he continued, "have been warned for years to stop harboring and supporting these terrorist groups. But these countries that persistently host terrorists have no right to be safe havens."[79]

The larger result of U.S. actions did nothing to deter Bin Laden, disrupt his network, his following, or the sanctuary status he enjoys in Afghanistan. What it did manage to do – was turn an entire nation of Afghans against the U.S. Much of the population who had no opinion either way about U.S.-Afghanistan relations or U.S. regional influence, were now more so inclined to side with Bin Laden "against U.S. aggression", than against Bin Laden himself. The attack was certainly meant to be personal. It was designed to get Bin Laden – but it failed. To drum up support in Bin Laden's favour and turn the public opinion and support *is not the way to deter terrorism,* and in hindsight the attack was viewed by many as not the most prudent choice.[80]

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[78] 'Cruise Missile Strikes in Afghanistan and Sudan', *American Society of International Law – Insight*, August 1998.

[79] 'President Swears to Use 'All Tools' Against Terrorism', *New York Times*, August 23, 1998

[80] 'A Moderate Thinks U.S. Shot Itself in the Foot', *New York Times*, August 25 1998.

The point of these case examples is to demonstrate how overt uses of force are applied as a response to terrorism. It is also meant to demonstrate that there are not a lot of positives that come from the overt use of force against states which sponsor or harbour terrorists, no matter how good the argument for *jus ad bellum*. This is why there must be a clearly defined, supported, and arguable end game to using force. Once response goes down this path, it is very hard to defend the reasons, and the damage within the international community often cannot be readily undone.

From a practical standpoint, often the use of force produces negligible results. Often it results in further retaliatory attacks, groups responding through the use of covert activity, international condemnation, reversal of public opinion, or just going horribly wrong. Very rarely if ever, can the case be made that terrorism was halted due to a successful and well-placed overt *and legitimate* use of force. This does not seem to detract, however, from the almost irrefutable sense this type of deterrence makes to some policy makers who somehow assume a few well placed, low grade, bombing runs will somehow lessen or deter the problem. As Bruce Hoffman pointedly notes "we should have realistic expectations. We are not going to achieve a spectacular victory overnight, if we even achieve a victory at all."[81] History has not been an alibi in this area, and if it has shown anything, it has shown that while doing nothing may be a worse policy, military retaliation does not necessarily the win the war on terrorism, and if it does anything at all, does more for domestic political gain than toward solving the problem of terrorism.[82]

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[81] Peter Grier, 'New Rules in New Kind of War', *The Christian Science Monitor*, August 24, 1998.

[82] Scott Peterson, 'Arabs Relate to Tit for Tat, but Doubt U.S. Motive', *The Christian Science Monitor*, August 24, 1998.

It's relevant to point out as well that terrorist attacks send a clear message. Retaliatory strikes do not always manage to accomplish the same. Unless there are no other options were to remain, unilateral military action should only be considered as a last possible resort, against a specific target, for a very specific reason, which can be evidenced and accepted by both citizens and allies of the retaliating state. No nation, regardless of status, likes to be rendered powerless, despite the consequences, and as observed by former U.S. President George H.W. Bush, "A president has to look at the vital national security of his country and in doing so act decisively in where and when to commit force."[83]

In light of this, it is worth noting that there is not always a lot of opportunity for military retaliation to take place, and often diplomacy bears the better option. This is best explained historically over 200 years ago when U.S. President General George Washington took office while Barbary pirates were holding American hostages. Instead of using force, he negotiated a treaty, ratified by the U.S. Senate, which paid ransom for the hostages and continued to pay them off so they would refrain from taking any further hostages. This was actually precedent setting in many ways. There are often times when leaders, even leaders who are strongly in favour of using military retaliation, find themselves in a position where negotiation is if not inevitable, the preferred choice, and they wind up caving in. This is not necessarily a reflection of leadership and politics as much as it is the indelible nature of society, which is to stay the course when the path charted, provides the least amount of friction.

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[83] George H.W. Bush's comments from a panel discussion *American Perspectives – 10th Anniversary of the Gulf War* given at Texas A&M University, February 23, 2001.

6.4 Alternatives to Force

The inability to exact the law, the near certainty of civilian casualties, or the doubtful success of deterrence, creates a strong case for the alternatives. Economic sanctions to punish states that sponsor terrorism are an attractive option. Generally, economic sanctions are defined as "coercive measures taken against one or more countries to force a change in policies, or at least to demonstrate a country's opinion about the other's policies."[84] The crux of the argument for sanctions makes the case that sanctions are effective because they reduce the target country's economic welfare and thereby force that government's regime to give in and abandon a particular policy often found objectionable.[85] They are imposed in the form of trade embargoes, restrictions on imports/exports, and denials of foreign assistance such as loans, the freezing of foreign assets, tariff increases, prohibitions on credit, and the prohibition of economic transactions.[86] They can be defined through political and military penalties as well, such as the withdrawal of diplomatic relations, visa denials, arms embargoes, or revocation of Most Favored Nation status.[87] Sanctions are inflicted one of three ways,[88] first, as imposed by a single country or group of nations against another country whose actions threaten the economy, or security of the sanctioning

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[84] Foreign Affairs and National Defense Division, Congressional Research Service, Economic Sanctions to Achieve U.S. Foreign Policy Goals: Discussion and Guide to Current Law, 1997.

[85] William H. Kaempfer & Anton D. Lowenberg, International Economic Sanctions: A Public Choice Perspective (The Political Economy of Global Interdependence), (Westview Press, 1992), p. 161. See also: Richard Haass, Honey and Vinegar: Incentives, Sanctions, and Foreign Policy, (The Brookings Institute, July 2000).

[86] Alan Einisman, *Ineffectiveness at Its Best: Fighting Terrorism with Economic Sanctions*, Minnesota Journal of Global Trade, vol. 9 no. 299, Winter 2000, pp. 302-303.

[87] Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, Brookings Policy Brief #34, June 1998, p. 1.

nations. Second, when a sanctioning country attempts to foist its ideology upon the sanctioned country. These first two are deployed mainly as tools to fight terrorism, whereas a third option, sanctions as a tool of trade policy or trade relations, would be utilized largely as economic policy between trading partners, but not effective toward terrorism as they lack the security or ideological reasons behind using sanctions.

Sanctions, as a method to implement U.S. foreign policy goals are the tool of choice on anything from human rights to terrorism to drugs; the use of sanctions has increasingly become the answer.[89] In fact, the U.S. has invoked sanctions 115 times since World War I, more than half that number (61 to be exact), have been invoked since 1995,[90] and over 75 countries with over two-thirds of the worlds population are subject to U.S. economic sanctions.[91] The reason for this is attractive, economic sanctions play a central role in the politics of American diplomacy and foreign policy in order to attain national, strategic, and economic goals. They provide a response to a challenge without impairing vital interests, they signify official displeasure with certain types of behaviour, they can reinforce a commitment toward a particular norm; and, as Haass notes, they "offer U.S. policymakers and members of Congress an attractive compromise between doing nothing and sending in the Marines."[92] The use of sanctions, however, can also impede America's economic interest, which is where a

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[88] Einisman, INEFFECTIVENESS, pp. 302-303.

[89] Richard N. Haass, 'Sanctions – With Care', *The Washington Post*, July 27, 1997

[90] David S. Broder, 'Sanctions Addicts', *The Washington Post*, June 24, 1998, p. A17.

[91] Richard N. Haass, 'Sanctions Almost Never Work', *The Wall Street Journal*, June 19, 1998.

[92] Einisman, INEFFECTIVENESS, pp. 302-303.

delicate balance must be struck, between U.S. economic interest and U.S. desire to defeat terrorism.[93]

State sponsored terrorism is viewed by many policymakers as nothing more than a form of low intensity conflict against the West.[94] The most glaring example of this is Libya, alleged to have sponsored numerous attacks throughout the 1980's, as well as committing resources to the attacks in Vienna and Rome airports, the West Berlin discotheque, and Pan Am 103 over Lockerbie, Scotland. Then U.S. President Ronald Reagan ordered an embargo of Libya, arguing that support of terrorist groups that attack U.S. citizens is the equivalent of armed aggression.[95] While there is merit to the belief that sanctions, unlike use of overt force, are a much more peaceful means of achieving change through the action of committing to 'bear the burden at all cost' in support of a particular position.[96] There is also the belief that by sanctioning the state accomplishes very little as the terrorist groups become self sufficient, and that by embargoing the state has a negligible effect on the states ability to sponsor terrorism.[97] Sanctions do not impose nearly the kind of economic hardship that is necessary to do real economic damage. This is largely due to an increasingly more efficient world market, where alternate suppliers of goods can be found in an alternative location.

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[93] Thomas W. Lippman, 'Negotiations on Sanctions Open on Hill: Administration Seeks Broader Discretion on Imposition of Penalties', *The Washington Post*, September 9, 1998, p. A24.

[94] Kenneth W. Abbott, *Economic Sanctions and International Terrorism*, 20 Vanderbilt Journal of Transnational Law, 1987.

[95] *Ibid.* See President Reagan's remarks from p. 304-305.

[96] *Ibid.* p. 303.

[97] *Ibid.* p. 305.

The leading drawback of sanctions is that every time sanctions are imposed, there is a backlash felt on the economy of the government issuing the sanctions. In the case of Syria, for example, there are clear economic costs to the United States at the price of some $250 million a year in lost exports.[98] That's a costly fight in the name of terrorism. Some studies show that perhaps as much as $15-$19 billion USD in reduced exports overall, affecting the job market, and tax revenues, but U.S. businesses which will bear the brunt of sanctions, losing a competitive advantage in those lost markets.[99] If there is any effect, it is largely felt by the oppressed population, not the government, which often prevents their citizens from obtaining food and essential medicines, reverting the resources to the military – not the mass populace.[100] The result, however, has proven little in results that would affect terrorism. Although former Secretary of State Madeline Albright noted that while state sponsored terrorism is in fact on the decline, "progress has been countered by the rise of terrorist groups that are less directly dependent on states,"[101] such statistics do not effectively support the case for using sanctions as an adequate means of combating terrorism.

6.4.1 Exclusion and Deportation

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[98] *Ibid* at note 95.

[99] *Ibid* at note 94. See discussion of Institute for International Economics Study, p. 310.

[100] Two of the most popular offenders of this are Iraq and North Korea, both of which have been the subject of numerous media articles. See: David MacIntyre, 'Missiles With a Message: While North Koreans Starve, Kim Jong Il Shows Off His New Technology', *Time*, September 14, 1998; Bruce W. Nelan, 'The Politics of Famine Millions in North Korea Face Starvation', *Time*, August 25, 1997; Mark Hosenball & Sarah Van Boven, 'The Battle in the Aisles: A Black Market in Baby Formula in Iraq Leads to a Scam That Has Crack Addicts Shoplifting in Middle America', *Newsweek*, December 8, 1997. Also, remarks by General Norman Schwartzkoff regarding Iraqi oppression of its people while Saddam builds new palaces, from the discussion *American Perspectives – 10th Anniversary of the Gulf War* given at Texas A&M University, February 23, 2001.

Beyond the prospect of sanctions, another alternate form of rendition other than extradition is that of exclusion and deportation. The distinction between the two is defined much more simplistically than they are executed in practice. Exclusion refers to persons who are seeking to enter the United States, and deportation, applies to persons already in the United States. It is a line that is commonly blurred as it often depends on the point which determines exactly "when" a person is officially in the United States, e.g.: crossed the border but not yet reported to a customs official. The distinction is especially significant as deportation hearings can afford more protection under the law as opposed to simple exclusion, which does not guarantee equal protection under the law as they are not officially in the country.[102]

Although both involve established procedures, they were not originally designed for the purpose of cooperation or the furthering of the international criminal justice system; but designed for the purpose of immigration control. Exclusion and deportation are informal processes, which rarely if ever involve a formal request on behalf of the state seeking the return of an alleged offender; rather they are enacted at the insistence of the territorial state. They are civil processes, and therefore do not apply the same standards of criminal justice with respect to state interest or to the protection of the accused.[103]

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101 'Embassy attacks fuel record toll of terrorism', *Minneapolis Star Tribune*, May 1, 1999, p. A4.

102 Alona E. Evans and John F. Murphy, eds, Legal Aspects of International Terrorism, (Lexington, MA: Lexington Books, 1978).

103 John Murphy, Punishing International Terrorists, The Legal Framework for Policy Initiatives, (Rowman & Allanheld), 1986, pp. 81-82, herinafter as MURPHY – PUNISHING.

The relevant international legal treaties that apply to exclusion and deportation are the Convention Relating to the Status of Refugees[104] and the Protocol Relating to the Status of Refugees.[105] The qualifying test for refugee[106] under these protocols is what determines whether an individual can be excluded or deported, and imposes limitations on the state of refuge if in fact the person does qualify for refugee status.[107] Of equal consideration, are cases of exclusion and deportation where if the accused can show that the likelihood of persecution in the state of destination, he/she may be able to bar his rendition.[108] However, regardless of how refugee Conventions and other instruments of international law subject legal norms to the issue of exclusion and deportation, the domestic law of the country of refuge largely governs these methods of rendition.

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[104] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, effective April 22, 1955.

[105] Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223 T.I.A.S. No. 6577, 606 U.N.T.S. 267, effective October 4, 1967. The protocol revises the convention making it applicable to events occurring after 1/1/51. See: Preamble in Article 1, paragraph 2.

[106] Refugee is defined under the Convention as:
[a] person who owing to well-founded fear of being prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself to the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.
Art. 1 § A, ¶ 2, 189 U.N.T.S. 137, as printed in Linda A. Malone, Smiths Review of International Law, (NY: Emanuel Law Outlines, Inc., 1995).

[107] ***Article 31, ¶ 1***: The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry.

Article 32 ¶ 1: The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

Article 33 ¶ 1: No Contracting States shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

See: Ibid.

[108] MURPHY - PUNISHING p. 85

There are drawbacks to using these alternative methods to extradition. Exclusion for example allows for the return of a fugitive only to the country from which he/she came from. It does not allow a fugitive to be returned to a country, which has an outstanding warrant for criminal activity, exclusion in that instance would be barred. Deportation as an alternative to extradition is significantly more difficult in the U.S., as the due process clause of the Fifth Amendment directly applies to deportation hearings.[109] U.S. statutory law provides that the government must establish deportability through "clear and convincing evidence" and that the decision to deport must be based on "reasonable, substantive, and probative evidence."[110] Even if the fugitive were found deportable, he/she would have a say in choosing the country to be deported to, and, if that country were to accept him/her it would likely not be the country seeking their return, thereby undermining the effectiveness of deportation as an alternative to extradition.[111]

6.4.2 International Criminal Court

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[109] The Fifth Amendment of the U.S. Constitution holds that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." See: Article 5, The Constitution of the United States of America, in Ellen Alderman and Caroline Kennedy, In Our Defense The Bill of Rights in Action, (New York: William Morrow and Co. Inc., 1991).

[110] 8 U.S.C. § 1252

[111] MURPHY – PUNISHING, p. 86

The concept for an International Criminal Court is not a new one.[112] Theoretically, this notion of an international court would include judges from various countries with a variety of political backgrounds. The advantage, ostensibly, would be the ability to try a fugitive only for a common element of a particular crime, and punishment would be absent of the political prejudices inherent in a single state's judiciary.[113] An added benefit to this would be the extra pressure placed on those states which granted asylum, and in the case of terrorism, this could prove to be beneficial, and since it would be a court representative of various countries, it could potentially be a truly international response to the problem. In theory, it could conceivably even address issues such as political offence, a predominant issue in many terrorist cases. And potentially, it could lead to some assimilation of international criminal law with regard to ideologically or politically motivated offenders. Unlike the current divergent reasoning toward this issue, political offenders could be treated the same way regardless of venue.[114]

The problem is largely state cooperation, required if the court is to be effective. Two immediate issues born out of this are first, states will not readily surrender sovereignty in criminal matters, and second, some states will not wish to be subservient to an international institution.

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[112] The Proposals of M Laval to the League of Nations for the establishment of an International Permanent Tribunal in criminal matters, 21 Transactions of the Grotius Society 77, 1921; Hudson The Proposed International Criminal Court, 32 American Journal of International Law 549, 1938; Bridge, The Case for an International Court of Criminal Justice and the formulation of International Criminal Law, 13 International & Comparative Law Quarterly 1255, 1964.

[113] Geoff Gilbert, Aspects of Extradition Law, (Dordrecht, Martinus Nijhoff Publishers, 1991), p. 156.

[114] Ibid. p. 156.

The U.S. in particular is a proponent of such thinking. After several years of negotiating an attempt to establish a permanent international criminal court to try people suspected of war crimes, genocide and crimes against humanity – several countries[115] led by the U.S. objected to the possibility of such a court having too much power. The major issues considered in the June 15, 1998 meeting of countries in Rome sought to resolve five major issues; first is states consent, which already grants universal jurisdiction over war crimes and genocide, so those accused could be tried in any jurisdiction. The contention was arose that states should be allowed to deny consent to the ICC, and review on a case-by-case basis, which advocates contend could paralyse the court.

Second, was the relationship between the ICC and the UN Security Council, which could potentially endanger peacekeeping operations. The U.S. contention was that peacekeepers could potentially be subject to the ICC for operations beyond the scope of their control – not an unfounded fear if the circumstance arose where an ambitious prosecutor were to specifically target Americans – or any nationality for that matter. The fear of a 'witch hunt' could significantly alter the ability of the Security Council to broker peacekeeping agreements if the court were to go after politicians or officials involved in the conflict.[116] U.S. negotiator at Rome, ambassador-at-large David Sheffer appearing before a subcommittee in the U.S. Congress testified that:

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[115] This group led by the U.S. and France, supported by Russia and China, claims that the powers of such a court must be restricted to respect national sovereignties. A smaller group, consisting of India, Mexico, and Egypt – were reluctant to allow the court any 'real' power at all. See: 'The UN and War Criminals, How Strong a Court?' *The Economist*, June 13, 1998.

[116] 'A new world court', *The Economist*, June 13, 1998.

> *Multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could conceivably be prosecuted by the international court even if the United States has not agreed to be bound by the treaty.*[117]

This is a concept which contradicts even the most fundamental principles of treaty law.

The third issue on the table in Rome, and most contentious issue between the U.S. and the ICC, however, lies in the power of the prosecutor. Within the blueprints of the text, there are no limitations on the prosecutor's freedom of action, and no amendments that would have established full Security Council control over the prosecutor. The U.S. position does not want free-lance prosecution without a complaint from the state; whereas backers of the system claim that a strong court must have the power to investigate cases brought to his attention by anyone. Yet, the office of the prosecutor will be accountable to no one, subject to few of the checks and balances that restrain law enforcement in a democracy and virtually empowered to enact punishment on individuals who have no control over its operation.

Fourth is the issue of complimenting the national courts, not replacing the national courts. The purpose of an international criminal court would be to act where the national courts have failed to act, lost credibility, or collapsed. Proponents of this believe the court and only the court can make this decision. The problem with this, is besides the obvious sovereignty infringements, is that there remains the possibility of

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[117] See David Sheffer's comments in 'Why the U.S. Objects to a World Criminal Court', *The Washington Post*, July 26, 1998.

an unaccountable body with the power to override national judgments, even those judgments that were arrived at democratically.

Finally, is the issue of defining crimes. It was never argued otherwise that the court should deal with genocide, war crimes, and crimes against humanity as defined by national treaties; however, several countries want it to include aggression, drug trafficking, and terrorism. Since little can be defined within these topic areas, it is largely contended that it should be left up to the national courts, however, it is not outside the realm of possibility that it could someday evolve to include these topic areas.

The treaty to create the court has been endorsed in principle by 139 signatory nations and 37 ratifications, and will enter into force with 60 ratifications. The Rome conference had 160 nations that agreed collectively to the U.S. demand that until highly detailed rules of evidence and procedure were established and agreed to, the treaty cannot progress,[118] and it stands to reason the court would be significantly weakened without the assistance of U.S. funds, which may ultimately be a bargaining chip for the U.S. Yet the first order of business after Rome for then U.S. Secretary of State Madeline Albright, was a review of the existing extradition treaties, and Statute of Forces agreements to ensure that they specified no U.S. citizens would ever be delivered to the jurisdiction of such a court. Which is, subsequently spelled out in all existing extradition treaties, the right of a State to deny the rendition of their own citizens.

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[118] Betsy Pisik, 'U.S. Seeks changes to accept international criminal court', *The Washington Times*, February 29, 1999.

It is not unreasonable to designate the international community to step in from time to time in the prosecution of War Criminals, such as the Nuremburg Tribunals, which brought Nazi leaders to justice, and the temporary tribunals on Yugoslavia and Rwanda created by the U.N. Security Council. But the creation of this new court would bestow the right to go after individuals, not states, and unlike the existing court in the Hague, will not be a part of the U.N. or answerable to it. It is the U.N. Charter which is charged with "primary maintenance of international peace and security", and it should retain this role.

6.5 Conclusion

State sponsorship of terrorism does, invariably provide unique circumstances affecting a state's ability to respond within the confines of accepted internationally agreed upon behaviour. Depending on the level of culpability, it will force the hand of response either in the form of aggressive overt retaliation, or more quietly using diplomatic or economic sanctions. Extradition will not be a firm possibility here, since the very nature of state sponsored terrorism indicates a low, if at all existent, level of legal cooperation. Also, in all likelihood, the existence of political relationships, or diplomatic overtures would not exist, unless of course they were managed by a third party, but still would potentially not be effective in securing any kind of cooperation, much less a solution. The very nature of the problem dictates otherwise, and forces a necessity for alternative action.

Striking back, or use of force as a reprisal might temporarily deter if only for a short time period, reminding the sponsoring states the cost of supporting terrorism, but it will not provide a long term solution, and can potentially only worsen the

problem. Yet, the demoralizing feeling of helplessness felt by the victim state is enough to fuel this type of reaction, if for no other reason than to signal to its allies and terrorists alike, that they are not rendered powerless or vulnerable. The greatest problem with this, of course, is the ability to provide evidence against the accused state of sponsorship. By its very nature, retaliation is not a dish best served cold, and once an attack is past, evidence collected, and the accused charged – the significant amount of time past does not warrant, under international law, under moral imperative, or in the court of public opinion, a mandate for self defense. This is, by far, the most difficult alternative to mount.

The possibility of more benign alternatives, such as sanctions, must also have limits. The force of economic or diplomatic imperatives bear a heavy burden not only on the sanctioned state, but on the state issuing the sanction. Sanctions require not just unilateral action, but group support. The ability to reign in allies to support a case against a particular state for supporting terrorism also requires that they too, take on an economic loss. Assurance that all parties will stay the course of these sanctions is no guarantee, and cracks in the alliance ultimately provide for their downfall. Sanctions are meaningful in some cases, but largely do not readily provide a solution to the problem, nor do they deter terrorism.

Alternate methods, such as deportation or exclusion, are real possibilities, and potentially effective, but face real problems in terms of legality. These are often difficult to implement, and do not necessarily offer a viable alternative to extradition, rather a last ditch effort to execute the law.

The one future prospect that remains of interest is that of the International Criminal Court, which is ever closer to moving from a 50-year old concept, to

becoming a reality. Whether or not differences can be ironed out, and proposed amendments compromised remains yet to be seen.

What this demonstrates are the growing pains associated with response to terrorism. Specifically, what happens when states are part of the problem, and not part of the solution, and how that affects not just the legal options of response, but response in general. What this shows us as well is the need for a different kind of system. One that doesn't just deal with on hierarchical levels of diplomacy and executive response, but on more integrated, more cooperative, more common ground levels, such as those found in the community of law enforcement or intelligence. There remain options other than the one's discussed here, that fall within the boundaries of legal choice, and which offer a viable alternative to extradition

Chapter Seven

The Evolution of U.S. Terrorist Extradition From 1985 - Present

> *"A new era of terrorism has begun, with a potential to be both bloodier and more destructive than any experienced before. The challenge the United States faces is to avoid the fate of the apocryphal French generals who were always preparing to fight the last war. The emergence of this new breed of adversary means nothing less than a sea change in thinking and counter terrorism policies will be required. Indeed, too often in the past, we lulled ourselves into believing that terrorism was among the least serious of complex security issues affecting this country. We surely can no longer afford to continue to do that."*[1]

7.1 Introduction

This chapter examines the final aspect of extradition present for discussion, specifically, the additional methods of bringing terrorists to justice that exist within the legal parameters of international law, but outside the formal obligation presented by extradition. Also, how the methodology of extradition has evolved from its treatment a decade and a half ago, to the present. It is meant to demonstrate the evolution of how the problem of capturing terrorists has changed from executive sabre rattling to a lower level, and much less public, arrangement consisting of a network web of law enforcement. This evolution in how capturing terrorists has changed from the early 1980's when the problem of terrorism came to the forefront for the United States – to the present day, represents a signalling not only in how the U.S. uses the law of extradition, but how their dependency on international cooperation has marked a significant increase.

In 1985, U.S. Vice-President George H.W. Bush's Task Force on Terrorism produced findings which acted as the basis for President Reagan to formalize National

Security Decision Directive (NSDD) 207, the first actual U.S. Counter-terrorism policy, and which reaffirmed and institutionalised federal jurisdiction over terrorism in two categories. First, the Department of Justice through the Federal Bureau of Investigation would have legal jurisdiction over, and investigate, all incidents of domestic terrorism. Second, the U.S. Department of State would have legal jurisdiction over and lead-agency status on all incidents of international terrorism. This was a sensible arrangement since it was cleanly in step with the mission of the respective agencies. It also made sense because of the nature of terrorist activity. Terrorism could often be tied to state sponsorship, Libya or Iran, for example, two major contributors who could often be even tenuously linked with events. The sponsorship of mercenaries, either financially or through safe harbour is yet another example, but the point is that for quite some time, there was a readily obvious enemy. What the international community witnessed in the 1980's was a relatively dramatic incident, followed by an executive member of government, usually a U.S. President, standing before the televised world shaking his fist, warning terrorists not to cross the line again. This type reaction was often the result of a crisis, such as the earlier discussed case examples; often when there were casualties; and it often never worked as a deterrent of any sort.

What has been demonstrated up to this point in the study by way of case example has been some of the growing pains the U.S. has experienced in the process of establishing a legal methodology toward the successful surrender and trial of terrorists. The importance of international cooperation, the sway of political

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[1] Bruce Hoffman, 'The New Terrorist: Mute, Unnamed, Bloodthirsty', *Los Angeles Times*, August 16, 1998, p. M1.

influence, and the alternatives when extradition is abandoned altogether, have forced the U.S. to undertake a process of learning how to deal effectively with the problem of terrorist extradition, sometimes without ever having to use extradition at all.

Married to this concept is the changing nature of the opponent – the terrorist. No longer can it be assumed that he/she is a discernable enemy; the changing nature of terrorism itself has largely impacted the way it is dealt with in terms of law enforcement and response. This change has largely been a result of the terrorist's learning curve as well, where not only have they found a way to be increasingly undetectable and elusive, but increasingly lethal as well.

The overall aim of this chapter is to illuminate these changes as they apply to both the changing nature of terrorism and changing nature of response, through recent case study examples, to analyse these cases, and relate this to the evolving concept of extradition and law enforcement.

The first part of this study will be to discuss the changing threat that terrorism has presented over the past decade and a half. The tactics and trends employed, which have changed significantly since the early to mid1980's to the present day, have called for important modifications in the roles of intelligence, law enforcement, and extradition or its alternatives.

The second part of this chapter will examine two recent case examples involving both extradition and an alternative – rendition, which will also be discussed and addressed in the third part of this chapter to more detail. The World Trade Center bombing, and the extradition / rendition of its suspects abroad for trial, is the first case study example. The U.S. Embassy bombings in Kenya and Tanzania, and the extradition / rendition of the suspects, is the second. Both of these case studies have

been dissected to highlight the meaningful facts only about the incident and investigation, not a blow-by-blow account of all details, as the focus is intended to illuminate the extradition or rendition of the suspects, not the exhaustive minutiae of the entire case.

The third part of this chapter will deal with the concept of rendition as an alternative to extradition. What is rendition? How and when is it used? Why? Are questions, which will be discussed and applied to the larger example of the case studies. In addition, remains the question of whether or not rendition weakens the integrity of the law by acting as an alternative to extradition. The relationship these two legal principles share toward the common goal of justice against terrorism will be explored as well.

7.2 The Changing Nature of Terrorism and Its Impact on Law Enforcement

Up to this point the treatment of terrorism in this study has been a discussion of earlier terrorist incidents and tactics, cold war style terrorist causes and state sponsored acts of violence. The detention and killing of American citizens abroad, such as the *Achille Lauro* incident and the TWA 847, incident were highly publicized occurrences perpetrated by politically motivated groups, operating under an established ideology, in an identifiable organization. The PLF, the splinter faction to the Palestinian Liberation Organization which claimed responsibility for the Achille Lauro incident,[2] and the Hezbollah, the radical Lebanese Shiite group responsible for

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[2] See Chapter 4.4 The Achille Lauro Case.

TWA 847[3], are both groups with a defined set of objectives, and which usually take credit for their actions. Regardless of whether or not the rationale was pleasing to the international community, or society on balance, these groups would convey understandable objectives, which at the very least could potentially draw sympathy if not dramatic attention to their cause. Such groups were relatively clearly linked to their connection of a foreign government, either by actions carried out at the behest of their sponsor, or by direct control.[4] This has changed in the past decade, and as the trend has evolved from attacks driven by social and economic imperatives toward amorphous religious aims with "vehemently anti-government forms of populism reflect far-fetched conspiracy notions,"[5] and consisting of an agenda largely predicated upon revenge and mass destruction.

Previous trends for political terrorist attacks typically sought to achieve their political or economic goals through carefully calibrated violence.[6] Excessive violence, would deny them the opportunity to bargain for the legitimacy they were so desperately seeking, the Palestinian Liberation Organisation under the leadership of Yasir Arafat is a perfect example of this. Among the more dangerous current trends in international terrorism have been Islamic Fundamentalist attacks, directed more

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[3] See Chapter 5.2 The Hamadei Case.

[4] Hoffman observes: "In the past, terrorist groups were recognizable mostly as collections of individuals belonging to an organization with a well-defined command and control apparatus, who had been previously trained (in however rudimentary a fashion) in the techniques and tactics of terrorism, were engaged in conspiracy as full-time avocation, living underground while constantly planning and plotting terrorist attacks, and who at times were under the direct control, or operated at the express behest, of a foreign government." See: Bruce Hoffman, Inside Terrorism, (London: Victor Gollancz Ltd.), 1998, pg. 197. *Hereinafter*, INSIDE TERRORISM.

[5] See: Bruce Hoffman's comment in 'The New Terrorism', *The Economist*, August 15, 1998, p.17.

[6] See: Bruce Hoffman, *Terrorist Targeting: Tactics, Trends, and Potentialities*, Paper presented at the Seminar on Technology and Terrorism at St. Andrews University, Scotland, August 24-27, 1992, on pp. 3 and 5. See also: Rod Nordland and Ray Wilkinson, 'Inside Terror, Inc', *Newsweek*, April 7, 1986, "Legitimizing Terror", *Washington Times*, July 6, 1987.

toward achieving spectacular incidents with a greater number of causalities, and motivated by a world view designating them as the "vanguard of a divinely ordained battle to liberate Muslim lands."[7] Terrorists who align themselves with the likes of Osama bin Laden, for example, are less concerned with acceptance and are not looking for the bargaining table to achieve legitimacy. They are less concerned with the secular political concerns of their predecessors, their objective is to kill, and in large numbers.

The U.S. Department of Defence 1997 Annual Defence Report, identified five factors which identified this increasingly lethal shift in trends: the disintegration of the Soviet Union, changing terrorist motivations, proliferation of technologies of mass destruction,[8] increased access to information and information technologies, and accelerated centralization of vital components of the national infrastructure, which has increased their vulnerability to terrorist attack.[9] DoD predictions also place terrorism as the new 'weapon of choice' with the majority of terrorism directed toward the U.S. targets as tied to ethnic and religious conflicts, often urban in nature, and more likely in capital cities.[10]

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[7] See: Daniel Benjamin and Steven Simon, 'The New Face of Terrorism', *The New York Times*, January 4, 2000, p. 19, col. 1.

[8] While much has been written on this, technologies of mass destruction have not yet been used, baring the one exception of the sarin nerve gas attack in the Tokyo subway in March 1995 carried out by Aum Shinrikyo. For discussion on this topic see: Richard A. Falkenrath, Robert D. Newman, Bradley A. Thayer, America's Achilles' Heel: Nuclear, Biological, and Chemical Terrorism and Covert Attack, (MIT Press, 1998).

[9] U.S. Department of Defense, *1997 Annual Defense Report*, Chapter 9: Terrorism: A Phenomenon In Transition.

[10] Ibid.

Threats from non-state actors with no ties to government, such as the al-Qaida[11] network, Japan's Aum Shinrikyo,[12] and the FARC in Colombia,[13] which have their own funding networks through narcotrafficking, private business, local financial support, charities, or their own independent wealth, as is the case with Saudi financier Osama Bin Ladin[14], continue to pose dangers. These actors can independently recruit new members from local areas, and often in areas where local conflicts can assist in recruitment, such as in Chechnya,[15] or Albania.[16] Some groups, such as Hamas and Hezbollah often create rival institutions to public services, such as schools, and healthcare.[17] The infusion of money, services, and training into an already conflict-ridden society, make for an increasingly volatile situation, agitating existing contempt against Western society. As Ambassador Sheehan contends, in his recent remarks on Post-Millennium Terrorism at the Brookings Institute:

> *"Especially since the end of the Cold War, a number of terrorist groups have portrayed their cause in religious and cultural terms. This is often a transparent tactic designed to conceal political goals, generate popular support, and silence potential opposition. It feeds upon the resentments and suffering of the people who feel forgotten or marginalized in today's rapidly globalizing society."*[18]

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[11] See: *U.S. Department of State, Patterns of Global Terrorism 1999*, U.S. Department of State Publication, April 2000. Hereinafter PATTERNS. For a copy of the report see the U.S. Department of State website at: http//:www.state.gov/www.global/terrorism/annual_reports.html

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Ambassador Michael A. Sheehan, Coordinator for Counterterrorism, Speech at the Brookings Institute, Washington, D.C., February 10, 2000. See transcripts p. 5.

[16] Ibid.

[17] Ibid.

[18] Ibid.

It is these emerging non-state actors which have exhibited considerably less constraint that their earlier state sponsored counterparts in past decades, and many have actively sought to acquire weapons of mass destruction to increase the lethality of their attacks, seeking the psychological impact of a 'body count'. This change of mission reflects largely the change of the type of attacker, which resemble less the more insular, tight-knit trained units; but a more spontaneous group sharing in a common philosophy which come together for a 'one off' strike, only to vanish again into the same obscurity from which they came. The entire operation, designed, planned, reconnaissanced, and implemented to hide the identity of the attackers as well as their sponsor. In this absence of a command structure, the terrorist attackers enjoy an aura of anonymity, which encourages more indiscriminate, lethal, operations. This new brand of nihilism presents another disturbing, emerging trend: the inability to connect the act with the perpetrator, which is worrying when the effect is potentially the use of weapons of mass destruction by a seemingly invisible enemy.

The ability to identify presents the most significant challenge to governments who seek to counter these groups, and these non-state transitory terrorist entities that leave few footprints of identifiable terrorist organizations, making it difficult for law enforcement investigators to identify the perpetrators of the attack, and actually apprehend the attacker. Although there have been cases where perpetrators of this 'new terrorism' have been caught and convicted, the case of Ramzi Yousef to name just one example, the ability to accomplish this is extraordinary. The problem has only been exacerbated by the ending of the cold war, making it easier for terrorists to operate independently without the need for government help. In addition there exist a vast amount of weapons and explosives, which find their way to the black market

every year as a result of the break-up of the former Soviet arsenal.[19] While the United States presently identifies seven states which currently act as sponsors of terrorism,[20] they caveat that not all of them are 'active' sponsors of terrorism, such as Cuba for example.[21]

The new challenge to law enforcement, and the inherent problems it creates for legal response must also take into account the line between domestic and foreign issues, which is often blurred, if at all existent. As easily as people can move through borders, so do drugs, weapons, explosives, and ultimately crime. Terrorist organizations can more easily engage in simultaneous operations both domestically and internationally, foreign banks and businesses can own and operate banks or businesses in the United States while at the same time funding illegal activities. Even multinational companies can more easily violate laws which apply to the transfer of special technology. These examples, and more, not only help make it easier on the terrorist, but ultimately undermine the separation of powers for law enforcement.[22] Those agencies that were initially charged by charter with domestic operations only, such as the FBI, or the DEA (Drug Enforcement Agency), or Immigration, have found themselves with increasing responsibility and jurisdiction for investigations beyond the waters edge. Those agencies, whose charter defines the sphere of responsibility abroad, such as the CIA, or Diplomatic Security, often find these distinctions blurred when confronted with an investigation of both domestic and transnational importance.

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[19] Ibid. at note 8, p. 18.

[20] Iran, Iraq, Libya, North Korea, Cuba, Sudan, and Syria are listed as the seven major sponsors of terrorism, source: PATTERNS p. 2.

[21] Ibid.

The concern over which has priority regardless of venue or whether or not foreign policy concerns trump that priority has caused a major restructuring of many of the way law enforcement agencies do business. Much of this was addressed in a Congressional report conducted by The National Commission on Terrorism in 1999, assessing the current U.S. practices against terrorism. As a result, some inter-agency jurisdictional lines were redrawn, and reassessed in terms of overlap. The FBI's extended power in overseas operations and investigations due to their primary ability to conduct criminal investigations by default of their training and primary function, is one example, but perhaps the most poignant example of the adaptation of law enforcement has had to make toward the evolving problem of terrorism, and terrorist threat.

7.3 Case Examples

The following case studies demonstrate recent examples in terrorist extradition as well as an alternative method of extradition not yet covered – rendition. From 1993 until 1999, there have been 13 cases involving bringing suspects of terrorist crime to the United States.[23] Actually, only four of these cases involved extradition, the remainder involved rendition of the fugitive offenders to the U.S.,[24] a process that will involve a more in-depth discussion further on. However, for the purpose of this brief case study section, understanding the semantics between the two will not be wholly

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[22] Making Intelligence Smarter – The Future of U.S. Intelligence, Report of an Independent Task Force, Sponsored by the Council on Foreign Relations, Richard N. Haass, Project Director, July 1998.

[23] PATTERNS

[24] Ibid

necessary, but should be viewed as similar in terms of their result, which is the return of fugitives to the United States for the purpose of trial.

7.3.1 The World Trade Center

On February 26, 1993,[25] an explosion went off in the underground parking garage of The World Trade Center, New York City's largest tower,[26] which was designed to topple the tower into the twin building on its flank, bringing them both crashing to the ground amid a cloud of cyanide gas.[27] Had the attack gone as planned, over 250,000 people would have perished, producing the single largest terrorist attack in history – instead, one tower did not fall into the next, the cyanide gas rather than vaporizing into the atmosphere, burnt up in the explosion,[28] and ultimately six people perished as a result.

The true scale of the destructive nature of this attack was not widely publicized, and the key architect behind the attack whom had entered the U.S. on an Iraqi passport under the name of Ramzi Yousef, was two years later apprehended[29] just before the execution of another spectacular bombing conspiracy. In January of 1995, Yousef had planned, in one day, to blow up eleven commercial U.S. aircraft using liquid

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[25] This date held a particular significance, as it was the second anniversary of the end of the Gulf War.

[26] Dave Williams, 'The Bombing of the World Trade Center in New York City', *International Criminal Police Review* – No. 469-471 (1998). See also: Ralph Blumenthal, 'Tapes Depict Proposal to Thwart Bomb Used in Trade Center Blast', *New York Times*, October 28, 1993.

[27] Ibid.

[28] Ibid.

[29] 'Cracking the Case How fugitive bomb suspect was captured', *The Star-Ledger*, February 10, 1995; Lauri Mylroie, 'The World Trade Center Bomb: Who is Ramzi Yousef? And Why it Matters', *The National Interest*, Winter 1995/6.

explosives undetectable by airport metal detectors.[30] Fortunately, he was careless in mixing the concision in his Manila apartment and started a fire. Forced to flee, he left behind his computer,[31] unencrypted,[32] which contained all the valuable information which led to his arrest one month later in Pakistan. After a brief interrogation by Pakistani law enforcement, he was immediately handed over to U.S. law enforcement officials, and extradited to the United States to stand trial.[33]

The World Trade Center attack signified two things to the United States; first, that despite all prior held beliefs that "it can't happen here" – it did, and that the U.S. shores were no longer impenetrable to foreign terrorist attack. Second, that despite the U.S. arsenal of anti-terrorist, and counter-terrorist intelligence centers,[34] and multiple government agencies charged with securing the nations borders – the attack forced thinking about the potential for future terrorist attacks at home, especially the possibility of the potential for attacks involving WMD, nuclear, chemical or biological weapons, and Americans were now faced with the question of how much freedom they are willing to trade for more security.[35]

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[30] See: Charles P. Wallace, 'Foiled terrorist plot reveals deadly day of rage at U.S.', *The Fresno Bee*, 5/28/95, p. A1; Charles Wallace, 'Web of terrorism targeted U.S. jets Foiled plan would have blown up 11 planes in one day', *The Toronto Star*, 5/28/95, p. A4; 'Terrorists plotted to blow up 11 U.S. jumbo jets', *The Baltimore Sun*, 5/28/95.

[31] Charles Wallace, 'Web of terrorism targeted U.S. jets Foiled plan would have blown up 11 planes in one day', *The Toronto Star*, 5/28/95, p. A4

[32] According to one unattributable source: This was obviously an accident, and an accident that was pure luck for investigators since it could have taken a considerably longer amount of time to decipher that information – it was a "lucky break" for law enforcement.

[33] 'World Trade Center Bombing Suspect Apprehended in Pakistan', *Reuters News Wire*, February 8, 1995.

[34] There is in fact a distinction between the two – in U.S. Government definitions; anti-terrorism pertains specifically to defensive measures used to reduce the vulnerability of individuals and property to terrorist acts. Whereas counter-terrorism refers specifically to offensive measures taken to prevent, deter, and respond to terrorism. See: *DoD Annual Defense Report*, 1998.

[35] Richard Lacayo, 'How Safe is Safe', *Time*, May 1, 1995.

Yousef fled the U.S. shortly after the bombing on February 26, 1993, and remained on the FBI's Most Wanted List for close to two years, offering a $2 million reward was offered for information leading to his capture. The events leading up to his capture and extradition were largely the result of close coordination with American, foreign intelligence agencies, and law enforcement agencies. The investigation began with the December 1994 explosion aboard Philippine Airlines flight 434, killing one passenger and wounding 10 others. After an emergency landing in Okinawa, Japan, a radical Muslim guerrilla group claimed responsibility, but because the bomb making materials and construction, specifically the use of nitro-glycerine, U.S. authorities suspected Yousef as the possible architect of the bombing. Weeks later, Philippine police arrested two men in connection with a potential plot to kill the Pope, and discovered many of the same bomb making materials present in the World Trade Center bombing, as well as a fingerprint, which they passed along to U.S. authorities.

Yousef, evading arrest in Manila, fled to Bangkok, but was spotted by authorities before he managed to secure another flight to Islamabad. U.S. Bureau of Diplomatic Security Officials notified law enforcement in Pakistan before his arrival, where they were waiting for him. After two days of surveillance led by a joint effort of U.S. and Pakistani law enforcement officials, they were able to confirm his identity, at which point Pakistani officials arrested him.

Pakistani officials briefly interrogated Yousef, where he confessed to his role in the Trade Center bombing, he was quickly released to the custody of U.S. law enforcement, and extradited to the U.S. to stand trial. The arrangement agreed upon at the time between U.S. and Pakistani law enforcement authorities, was that a general

agreement and pledge on behalf of the U.S. to share all further intelligence information regarding terrorism it learned from Yousef. This special relationship was not wholly without some legal basis, the extradition treaty between the U.S. and Pakistan was established December 22, 1931, and ratified eleven years later on March 9, 1942.[36] There was prior, an established legal basis for the extradition, but this relationship was only strengthened by the ability of law enforcement to cooperate on a variety of network levels, which led to the capture of the ringleader of the bombing.

Another man affiliated with the bombing, Mahmoud Abu Halima,[37] a taxi driver, originally suspected as the mastermind of the bombing, was arrested in Egypt and extradited to the Untied States in March 1993.[38] The U.S.-Egypt extradition treaty was signed into law in 1874, ratified in 1875,[39] and more than provides a basis of legal merit for extradition. But the basis for Halima's extradition was more than just grounded in treaty law, it was part of a larger anti-Islamist alliance between Egypt and America which was only strengthened by Halima's extradition. Egypt's difficulties with Islamic militants stem from the 1981 murder of Anwar Sadat, and have been part and parcel of a battle between Islamic militants and Islam itself, the distinction being non-Muslims who do not separate Islamic beliefs from Islamic radicalism. The extradition of Halima to the U.S. was part of this crackdown on the part of Egypt, and one that was welcomed by U.S. authorities.

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[36] 47 Stat. 2122

[37] 'The Afghan Connection. (Muslims in Afghanistan and the Bombing of the World Trade Center)', *The Economist*, April 10, 1993, p. 49.

[38] 'Fifth suspect in World Trade Center bombing surrenders', *Agence France-Presse*, March 25, 1993.

[39] 19 Stat. 572

Eyad Mahmoud Ismail Najim, linked to the bombing through phone calls and fingerprints, and accused of acting as part of the planning and execution stages, specifically the transportation of the bomb, was the third terrorist extradited to the U.S. from Jordan, in August of 1995.[40] The extradition treaty between the two countries, U.S. and Jordan, was only signed into law of March of that year, and ratified July 29, 1995,[41] less than a week before Najim's extradition on August 3, 1995.

7.3.2 African Embassy Bombings

On August 7, 1998, at 10:40 am local time a car bomb exploded outside the U.S. Embassy in Nairobi, Kenya. At the same moment, some 450 miles away, another car bomb exploded outside the U.S. Embassy in Dar es Salaam, the capital of neighbouring Tanzania.[42] Together, both bombs killed at least 263 people and injured more than 5,000 others,[43] among those dead were twelve Americans.[44]

Hours later, a grim U.S. President Clinton stood before reporters and promised: "These acts of terrorist violence are abhorrent, they are inhuman. We will use all the means at our disposal to bring those responsible to justice, no matter what or how

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[40] 'Defense and Diplomacy – Man Pleads Not Guilty In New York Bomb Plot', *Washington Post*, August 4, 1995, p. A20; "Bombing Suspect Extradited", *The Guardian*, August 4, 1995.

[41] No corresponding U.S. citation.

[42] For a news account of the bombings see: Karl Vick and Stephen Buckley, 'Base! Base! Terrorism! Terrorism!', *The Washington Post*, August 13, 1998; Alan Cooperman, "Terror Strikes Again" *U.S. News and World Report*, August 24, 1998.

[43] Robin Allen and Carola Hoyos, 'Millionaire, terrorist, fugitive', *Financial Times Weekend*, April 14-15 2001.

[44] Stephen Buckley, 'Bomb Vehicle Was Turned Away', *Washington Post*, August 10, 1998, p. A1,

long it takes."[45] As national security and law enforcement officials mobilized to make good on the President's promise, there was mounting skepticism in the U.S. as the all too familiar echo's of his predecessors from previous promises after previous attacks reminded Americans that success was often elusive in such cases.[46] Secretary of State Madeline Albright pleaded with Americans to be patient while investigators sought to learn the identity of the bombers, and suggested that America would retaliate against them, or their sponsors, if necessary.[47] And within days, over 375 FBI Agents and criminal experts poured into East Africa[48] for what would become the FBI's largest overseas investigation – which afterwards would widely be judged as a success.

FBI and Criminal Investigative Divisions in both Kenya and Tanzania, shared the tedious and often grisly work of combing through rubble collecting bomb fragments, traces of explosives, often found in the fragments of human remains, and a myriad of other evidence, which was shipped back the FBI labs for analysis. They concluded the crudely designed bombs each contained over 2,000 pounds of TNT, detonated by blasting caps laced with RDX, a plastic explosive, in addition to oxygen acetylene

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[45] President Clinton's comments, see: 'The Search for the Culprits', *Financial Times*, August 8 / August 9, 1998.

[46] Stephen J. Hedges, 'U.S. Better at Promising to Nab Terrorists Than It Is At Doing So', *Chicago Tribune*, August 10, 1998; Tim Weiner, 'Experts Starting Search for Clues in Kenya Bombing' *The New York Times*, August 10, 1998, p. A1; Kenneth R. Timmerman, 'Who Bombed the Embassies?', *The Wall Street Journal*, August 11, 1998

[47] Ibid at note 45; Richard Wolffe, Michela Wrong, Roula Khalaf, 'FBI agents to probe embassy blasts', *Financial Times*, August 10, 1998.

[48] 'Bombings Put Focus on Saudi Patron of Terror', *The Wall Street Journal*, August 10, 1998; Robert Block, 'Loss of Clues Feared in Nairobi Bombing', *The Wall Street Journal*, August 10, 1998.

tanks, a trademark of Middle East terrorists who believe that they enhance an explosion, which they do not.[49]

On the ground in Kenya and Tanzania, FBI teamed up with the local police running leads across the city, which turned up Rashed Daoud al Owhali, who later would be discovered to have driven the truck bomb into the embassy in Kenya, but the most serendipitous catch, however, was a thousand miles away by an immigration officer through a passport fraud case in Karachi, Pakistan. For three days, Pakistani authorities questioned Mohammed Sadeek Odeh, who eventually after intense interrogation claimed to have a role in the bombings. Pakistani authorities then contacted U.S. law enforcement officials. Odeh, escorted back to Nairobi by the American Central Intelligence Agents, stonewalled FBI investigators until the Kenyan police turned up evidence he had stashed in his home, at which point he confessed. This breakthrough eventually led to the identification, and arrest of three additional terrorists implicated in the bombing,[50] and successfully identified the group responsible – Al Qaeda, and its ringleader Osama bin Laden.[51]

The success of the investigation was due entirely to the level of cooperation shared between the FBI, the Criminal Investigative Division in Kenya, and local police on the ground in both Nairobi and Dar es Salaam, a lesson the U.S. learned

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[49] David E. Kaplan, 'On terrorism's trail -- How the FBI unravelled the Africa embassy bombings', *U.S. News and World Report*, November 23, 1998, p. 31.

[50] *Investigators raid Nairobi hotel where bomb reportedly was made*, CNN News story, http://www.cnn.com/World/africa/9808/19/africa.02/; Susan Linnee, 'Islamic Groups Warn of More Attacks', AP Headlines, August 19, 1998.

[51] Thomas W. Lippman, 'Albright Chides Afghan Rulers', *The Washington Post*, August 19, 1998, p. A24; The Charges Against International Terrorist Usama bin Laden, http://www.fbi.gov/majcases/eastafrica.summary.htm; and http://www.fbi.gov/contact/fo/nyfo/11041998.htm.

from their stonewalled investigation of the Khobar Towers bombing which fizzled due to poor communication between U.S. and Saudi authorities.[52]

Although the original U.S.-Kenyan extradition treaty, established on December 22, 1931, and ratified June 24, 1934[53] was updated again in August 19, 1965,[54] both Mohamed Rashed Daoud Al-Owhali, and Mohamed Sadeek Odeh, who were retained in U.S. custody in Kenya, were rendered, not extradited, to the U.S. to stand trial.[55]

Another implicated in the bombing, Mamdouh Mahmud Salim, was extradited in December 1998 from Germany, without incident under the U.S.- German extradition treaty.[56] Khalfan Khamis Mohamed, who played a direct role in the bombing, was responsible for arranging the bombing, and finding a place for the bomb to be assembled,[57] was deported in October 1999 from South Africa.

The rendition of the later individual, Khalfan Khamis Mohamed, caused some controversy with the South African government. Shortly following the indictment of Mohamed, in May 2001 on all 302 counts of conspiracy, murder, and perjury; South Africa's highest court ruled that the 'extradition' of Mohamed was 'unlawful'. Mohamed's rights were allegedly violated when he was extradited to the U.S. in October 1999 without an assurance that prosecutors would not pursue capital punishment. The punishment which the U.S. jury was urged to consider following the

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[52] Ibid at note 52.

[53] 47 Stat 2122

[54] 16 UST 1866

[55] 'More embassy bombing suspects to be sent to U.S.', *Reuters*, August 31, 1998.

[56] Signed June 20, 1978; ratified August 29, 1980; 32 UST 1485.

[57] Phil Hirschkorn, 'Prosecution leaves jury with mounds of evidence to ponder', CNN New York, http://www.cnn.com/2001/LAW/trials.and.cases/case.files/0012/embassy/index.htm

trial conviction, was death by lethal injection, the maximum penalty the conviction would carry. The South African court ruled the extradition "infringed on Mohamed's right to human dignity, to life, and not to be treated or punished in a cruel or inhumane or degrading way."[58]

Inherent in almost every extradition treaty or multilateral agreement, is the option to refuse extradition to a requesting state where the death penalty would be an option for punishment. South Africa, having abolished the death penalty in 1995, now has laws which prohibit exposing anyone to the risk of execution through extradition or deportation. Mohamed, was actually deported, *not* extradited, but the same rules apply under South African law.

After the bombing Khalfan Khamis Mohamed fled to South Africa and applied for political asylum under an alias. He retained a temporary residence permit, and supported himself as a short order cook. By the time of his arrest in October 1999, police had traced a fake Tanzanian passport application to his South African residence, and when Mohamed attempted to renew his immigration papers, the South African police arrested him for entering the country under false pretences, then initiated deportation, and turned him over to the U.S. authorities for interrogation. Mohamed was not given an attorney when FBI Agents interrogated him, but had requested deportation to the U.S. given the choice between the U.S. and Tanzania. Technically, deportation is a return to your country of origin. Although fake, Mohammed had carried a Tanzanian passport, and should have been deported back to Tanzania, which he was not. The South African court acknowledged they had made a

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[58] Phil Hirschkorn, 'South Africa court says convicted bomber's rights violated', CNN New York, http://www.cnn.com/2001/LAW/05/29/bombings.south.africa.index.html

grave constitutional error after the incident had taken place, but could not undo the situation since Mohammed was already out of the country and on trial in the U.S. The South African court rendered their decision and sent it along to the U.S. district court, and while it is unlikely to have any effect either on the proceedings or the outcome of the case, it could potentially have an effect on extraditions in the future.[59] Countries whose constitution outlaws the death penalty, may find it difficult to cooperate on unofficial levels where rendition or deportation is an option, with countries where the death penalty could potentially be a part of the punishment. Constitutionally, the asylum state would not be able to engage in matters of unofficial or interagency cooperation if it meant a violation of the law of the land, and would potentially hinder future collaborative efforts.

7.3.3 Mir Aimal Kansi

In January 25 1993, a Pakistani refugee positioned himself outside the front driveway entrance of Central Intelligence Headquarters in Langley, Virginia, and randomly shot at CIA employees heading to work that morning. After killing two people, he then fled the country.

Mir Aimal Kansi, had entered the United States in 1990 on a B-1 tourist visa issued in Karachi, Pakistan. In 1992, he applied for political asylum in the United States, and as routine dictates, was released with a work permit. Intelligence records on Mr. Kansi indicated that he had previously been involved in anti-U.S. demonstrations in Pakistan, and he had been able to purchase a semi-automatic AK47

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[59] Roger Cossack, 'Bombing trial could complicate extraditions', http://www.cnn.com/2001/LAW/05/30/cossack.bombing.extradition/index.html

assault rifle with his Virginia driver's license – which he was able to secure having obtained his work permit. There was no evidence to indicate, however, that Kansi was sponsored by another terrorist organization, he was not an agent of a foreign government, nor was he part of a larger plot; he was, apparently one individual acting out on his own accord.

At 4:00am June 15, 1997, five FBI agents sneaked into a hostel in the border region between Pakistan and Afghanistan, and where Afghan informants had told them they would find Kansi.[60] After taking Kansi captive, they brought him through Pakistan to an undisclosed airbase, boarded a military C-130 aircraft, and brought back to the U.S.[61] On June 18, he was brought before a federal judge in Virginia where he was ordered held without bond and eventually convicted for the murder of two CIA employees.

This was the second time that the Pakistani government had complied, through unofficial channels with U.S. government in an operation to secure a wanted fugitive from within their borders. When Yousef was captured for the World Trade Center bombing, the unofficial word was that Pakistan wanted to restore the special security relationship it once had with the U.S., and that there was some speculation that Pakistan was near to being added to the 'U.S. Department of State countries which sponsor terrorism' list.[62] Kansi was every bit a continuation of this thinking.

The people of Pakistan, however, were not willing to be as compliant. The government of Pakistan received mounting lawsuits from protesters to the extradition

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[60] *New York Times*, June 19, 1997.

[61] Bob Djurdjevic, 'The Long Reach of Uncle Sam', *The Washington Times*, June 29, 1997.

[62] 'Cracking the Case, How fugitive bomb suspect was captured', *The Star-Ledger*, February 10, 1995

of Kansi. The former director of Pakistan's Intelligence Agency, (ISI), as well as the Pakistani Institute of Human Rights were two of the organisations which claimed that the extradition of Kansi was unlawful, because it broke the laws of Pakistan. They argued that no lawful surrender of Kansi took place; rather it was the kidnapping of a Pakistani citizen.[63] The U.S. government reaction on the other hand, was victorious. The morning of June 18, 1997, press spokesmen stood defiantly before a Washington press corps and touted "*we got him, and that's all you need to know right now*!"[64] When the announcement was broadcast across the CIA building in Langley, VA, CIA Agents actually gave the FBI a standing ovation, a first in interagency history.[65]

Kansi himself engaged in its own legal skirmishes with the U.S. courts, over his legal representation. The U.S. Constitution's Fifth Amendment guarantees equal protection under the law, although as discussed later on there is precedent for some levity to this, still a judge had to order prosecutors to provide layers for Kansi, as well as witness's descriptions of the killer following the shootings.[66]

Interestingly enough regarding Kansi's capture, was the fact that it took so long to apprehend him at all. He had never left Pakistan, but is from an area of Pakistan considered 'lawless', the Western border along the Afghan border, which is governed largely by tribes. Kansi's family is a rich, powerful tribe, and in that area of Pakistan, they are the law, with Pakistani authorities relatively unable to penetrate this region.

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[63] 'Pak Govt faces lawsuits for deporting Kansi', *Associated Press*, June 25, 1997

[64] Channel 8 news report, June 18, 1997

[65] From an *Online Newshour* interview with Elaine Shannon, a *Time* magazine correspondent, in a segment called 'Facing Justice', which aired on June 18, 1997.

[66] 'Pakistani wins legal skirmish with U.S.', http://cgi.cnn.com/US/9708/05/briefs.pm/kansi/

His large, extended family, and their allies in the area had protected Kansi.[67] Following his capture and return to the U.S., he would be arraigned under Virginia State law, not Federal law even though his crimes were punishable under Federal statues. The reason for this is because the Federal statues did not include the death penalty for his crimes which took place in 1993, which was before the provisions took effect. Kansi was charged with two counts of murder, three counts of assault with the intent to commit murder, and various weapons charges, which would make him eligible for the death penalty under Virginia law, and this is what the Prosecutors were looking for.[68] There was some fallout from this, as allegations that a group sympathetic to Kansi claimed responsibility for killing four American oil workers slain in Karachi, Pakistan, vowing more slayings if Kansi were sentenced to die. A claim that U.S. embassy officials in Pakistan, as well as Pakistan's interior minister downplayed immediately.[69]

Kansi was convicted in 1997 of two counts of murder, and three counts of malicious wounding, and after seven hours of deliberation, a jury recommended him for the death sentence.[70]

An interesting side note to this case worth mentioning is the use of the death penalty. Present in international law, remains the right to refuse extradition to countries which may invoke the death penalty as a system of punishment.

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[67] Online Newshour, FACING JUSTICE

[68] Ibid.

[69] 'Jury: Murderer of CIA workers deserves death', November 14, 1997, http://www.cnn.com/US/9711/cia.verdict.wrap/index.html

[70] 'Jury recommends death for CIA shooter', November 14, 1997 http://cnn.com/US/9711/14/cia.verdict.index.html

Technically, Kansi was not a formal extradition case; however, the use of the death penalty by the U.S. still has some interesting implications for future potential co-operation.

Kansi's crimes took place in 1993, at which time there was no federal statute for the death penalty, which was why he was charged in the State of Virginia making him eligible for the death penalty. However, in 1996, spurred by the events in Oklahoma City and the World Trade Center, the U.S. passed the Antiterrorism and Effective Death Penalty Act of 1996. In sum, this document is an amalgamation of various legislative efforts toward terrorism, consisting of several sources from the major comprehensive terrorism bills passed in the U.S. Congress.[71] The significant highlights of the bill accomplish reforms in the following areas: habeas corpus reform,[72] justice for victims,[73] international terrorism prohibitions,[74] terrorist and criminal alien removal and exclusion,[75] nuclear, biological, and chemical weapons

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[71] 141 *Cong. Rec.* S2503 (daily edition February 10, 1995)

[72] Act to amend federal habeas corpus law as it applies to both state and federal prisoners. Amendments include: bar on federal habeas corpus reconsideration of legal/factual issues previously ruled by state courts; 1 year statute of limitations for habeas corpus petitions; 6 month statue of limitations in death penalty cases; state appointed counsel for inmates during habeas hearings; appellate court approval for repeated habeas petitions. See: Summary report of the Act by Senior Specialist Charles Doyle, *Antiterrorism and Effective Death Penalty Act of 1996: A Summary*, American Law Division, June 3, 1996, pp. 4-5.

[73] This recasts federal law concerning restitution, and expands the circumstances under which foreign governments which sponsor/support terrorism may be sued for resulting injuries, as well as increases the assistance and compensation available to the victims of terrorist acts. *Ibid.* p. 9

[74] Designed to sever the ties between terrorists and their sources of financial or material support. It enlarges proscriptions against assisting in the commission of terrorist crimes, and it authorizes the regulation of fundraising by foreign organizations associated with terrorist activities. *Ibid.* p. 14

[75] Divided into four main parts: The *removal of alien terrorists*, addresses how to reconcile the need to remove alien terrorists from the U.S. on the basis of classified information while still protecting the confidentiality of that information. *Exclusion of members and representatives of terrorist organizations*, establishes that membership or representation of a terrorist organization as a grounds for denying alien entry in the U.S. under title 8 U.S.C. 1182. *A modification to asylum procedures*, precludes asylum granted by the U.S. Attorney General for any alien terrorist unless determined there is no reason to consider the alien a threat to national security. Finally, *criminal alien procedural improvements*, which authorize disclosure of certain confidential information concerning alien legalizations, the creation of a criminal alien tracking station, the creation of a criminal alien ID system, and the expanding of immigration offences to the RICO statutes. The final part also expands U.S. extradition law to

restrictions,[76] implementation of a plastic explosives convention,[77] criminal law modifications to counter terrorism,[78] and assistance to law enforcement.[79] However, what would have been the most applicable to Kansi's case, if the agreement had been in force the time of his crimes, and perhaps the most significant in terms of potential cooperation, is Title VII – Criminal Law Modifications to Counter Terrorism. This specific section of the bill, essentially allows for the use of the death penalty as punishment for homicide as a result of terrorist crimes,[80] and extends the statute of limitations in which to bring charges.[81]

There were, and still are, appeals over Kansi's sentence. However, the larger issue here is that the use of punishment such as the death penalty could provide a real deterrent not only to extradition attempts, but, to the other forms of low-level inter-agency co-operation used as alternatives to extradition. It is entirely feasible; that some countries would be reluctant to participate in these co-operative operations if they knew the accused would face the death penalty. In a case such as Kansi's, or

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permit the U.S. to surrender, in the absence of an applicable treaty, foreign nationals charged with crimes of violence committed against Americans overseas in cases where political offence is not applicable, and that the offence would constitute a crime in the U.S. *Ibid* pp. 18-24.

[76] Adjusts the restrictions on possession and use of materials capable of producing catastrophic damage in the hands of a terrorist. *Ibid.* p. 24.

[77] Provides for implementing legislation for the Convention on the Marking of Plastic Explosives for the Purpose of Detection, negotiated in Montreal, March 1, 1991. The Convention would become effective when ratified by at least 5 explosives producing nations. *Ibid* p. 25

[78] Changes the existing federal law and procedure by expanding the reach of federal law and increasing penalties to more effectively combat terrorism. It makes it a federal crime to kill, kidnap or assault any federal officer or employee, to conspire in the U.S. to commit crimes of violence overseas, or to commit a crime of violence within the U.S. related to conspiracy occurring overseas. *Ibid.* p. 26.

[79] Authorizes the appropriation of an additional $1 billion to fund anti-terrorism law enforcement efforts, overseas law enforcement training, and parking bans around federal buildings in Washington D.C. *Ibid.* p. 34

[80] Title VII, Subtitle A, Sec. 702

[81] Statue raised from 5 years to 8 years, *Ibid.*

even the Fawaz Yunis case mentioned in Chapters 1 and 4, where rendition more closely resembled kidnapping, the asylum state's government would have legitimate domestic concerns to consider. Offering up an accused, especially if the accused is a citizen, would potentially result in some significant fall-out. In addition to which, not all states are in line with the U.S. policy of sending criminals to death row. As the reaction from the more recent execution of U.S. terrorist Timothy McVeigh is any gauge, even the most liberal democratic western allies to the U.S. do not approve. Potentially, the U.S. use of the death penalty for terrorists could provide some friction in cases involving terrorist extradition, or rendition operations.

7.4 Extradition –vs. – Rendition

The surrender of a fugitive by means agreed to by both states is referred to as informal rendition. It occurs when the official of the state of refuge acts "outside the framework of a formal process or without authority to facilitate the abduction or cause the surrender of the fugitive."[82] Unlike extradition practices which bring the matter to the attention of the judiciary, rendition is the result of an arrangement between two opposing state governmental agencies.[83] These cooperative undertakings are less reflective of the omission of due process than they are of the suggestion of cooperation and friendship between two states. Of course, this implies that the rendition process is agreed upon by the superiors of respective states, their knowledge, approval, and consent all prerequisites for this to transpire – and not merely an

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[82] Cherif M. Bassiouni, International Terrorism and Political Crimes, (Illinois: Charles C. Thomas Publisher, 1975), p. 352.

[83] See: Paul O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 British Yearbook of International Law, pps. 279-280.

undertaking of a personal nature without prior consent or knowledge in an effort to thwart a formal process. There are advantages to this; first, it removes much of the bureaucratic red tape from the formal extradition process. Second, it signals strong relations between two countries, which are not only willing to bypass the formalities of the extradition process, but due to the nature of their common response toward a particular crime, in this case terrorism, there exists an agreement of the crime as a terrorist act, not prevalent in all countries, and a common goal toward bringing the terrorist to justice. Granted, some countries may just be content with removing the culprit from their jurisdiction, allowing another state to try them removes some culpability as well toward future reprisals, and bypassing the formal arrangement may be the official line to their unofficial involvement, but nevertheless still signals the desire to cooperate and not look for an alternative which might not allow any form of rendition to take place at all, such as the case with both the *Achille Lauro* and TWA 847 cases. Finally, and perhaps the most important advantage, is that it strengthen ties for cooperation amongst law enforcement. Such was the case in Yousef, when he was released to authorities with the proviso that future intelligence regarding terrorism be shared between the two countries. Rendition, an entirely less formal process, creates bonds of trust between law enforcement agencies which can potentially be relied upon for future inquiries, in future cases or investigations. It is perhaps the best weapon for intelligence, for law enforcement, and for government in its persistent fight against these elusive groups and individuals in an ever increasingly mobile society. When used in this light, with this goal in mind, it does not weaken the integrity of the law or the obligation of extradition, rather the opposite, allowing the judicial process to be strengthened through mutually assured goals and ideas between the two countries

which have established through process an agreed understanding on a common problem. However, often the line of such informalities is stretched, and couched as law enforcement, when in truth they are incidents which violate the sovereign borders of another territory, it weakens not only the integrity of the law and due process of law, but weakens the relationship between states, between government agencies, and the potential for further trust and cooperation between law enforcement. Such cases include abductions or unlawful seizure, when agents of one state act in the territory of another,[84] and as explained by John Murphy, involves three distinct violations of law; first, disruption of public order; second, infringement on the sovereignty and territorial integrity of another state; and third, violation of human rights.[85] This type of response has a home in legal precedent in the U.S., known as the 'Ker-Frisbie doctrine', based on two U.S. Supreme Court cases. It holds that due process under the U.S. Constitutional Fifth Amendment which guarantees rights to due process under the law and a right to a fair trial, is limited in scope and does not necessarily apply to the *method* used to bring the accused into custody.[86]

Such incidents which occur, such as the case of Humberto Alvarez Machain, for example, demonstrate how the rendition principle is stretched further than intended. Dr. Machain was accused of injecting painkillers into a captured agent from the U.S. Drug Enforcement Agency, as traffickers from the Guadalajara drug cartel were torturing him, aiming to keep him alive longer for questioning. Five years later,

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[84] John F. Murphy, Punishing International Terrorists, The Legal Framework for Policy Initiatives, (Totowa, N.J.: Rowman & Allanheld, 1985).

[85] Ibid. p. 90.

[86] *Ker v. Illinois*, 119 U.S. 436 (1888) and *Frisbie v. Collins*, 342 U.S. 519 (1952).

Mexican bounty hunters posing as members of the Mexican Judicial Police, and bankrolled by the U.S. Government, kidnapped him from his office in Guadalajara, and flew him to El Paso, Texas where he was apprehended by U.S. authorities for trial. A U.S. Federal Judge ruled the case dismissed on the grounds that it violated the Extradition Treaty between the United States and Mexico, and ordered Machain to be repatriated.[87] The U.S. Court of Appeals upheld the decision that since the U.S. had authorized the abduction and since the Mexican government had protested on the grounds of treaty violation – and therefore jurisdiction was improper,[88] but it reversed the opinion of the lower court as a violation of the U.S. Mexican Extradition Treaty.

The court held the contention that the fact of respondent's forcible abduction does not prohibit the defendant's trial in a U.S. court for violations of U.S. criminal laws, that a defendant may not be prosecuted in a court for violation of the terms of an extradition treaty.[89] However, using the 'Ker-Frisbie' test, in the event a treaty has not been invoked, or if Mexico had not challenged, then the court may exercise jurisdiction even though the defendant was procured by means of forcible abduction.[90] The court ruled; "[t]he Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs."

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[87] U.S. Supreme Court, No. 91-712, *U.S. Petitioner v. Humberto Alvarez-Machain*, June 15, 1992.

[88] "The Court of Appeals deemed it essential, in order for the individual defendant to assert a right under the Treaty, that ath affected foreign government had registered a protest...Respondent agrees that the right exercised by the individual is derivative of the nation's right under the Treaty, since nations are authorized, notwithstanding the terms of an extradition treaty, to voluntarily render an individual to the other country on terms completely outside of those provided in the Treaty. The formal protest, therefore, ensures that the offended nation actually objects to the abduction and has not in some way voluntarily rendered the individual for prosecution." *Ibid.*

[89] Ibid pps. 3-15 dissent. For prior case law precedent refer to: *United States v. Rauscher, 119 U.S. 407.*

[90] Case law precedent Ker v. Illinois, 119 U.S. 436.

Since the intent written into the treaty was applicable to crimes, including murder,[91] committed both before and after the treaty was ratified, the natural conclusion was that intent was for the treaty to be mandatory for those offences regardless of when the treaty came into force.[92] The court concluded that:

> *"the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch. We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico..."*[93]

Although the general sources of international law provide censure of abductions, the court ruled that individual rights are subordinate to the Nation's right under the Treaty. Previous U.S. Supreme Court rulings have evidenced that, foreigners are not entitled to the same constitutional protections offered to U.S. citizens, which apply to search and seizure. Therefore, in the absence of such constitutional dialogue, treaty law and legal precedent are the only salient factors to be considered, while remedy in these instances would be matters of foreign policy to be determined by the Executive branch of government.

Often, the request for extradition becomes mired in formal proceedings and delay, even between two states that share amicable relations. It is important to remember that there is exclusive dependence on the decision making process of the requested state, which are often frustrated by treaty rhetoric, statutory procedures, and lengthy court decisions, and often leave the requesting state little choice but to seek

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[91] 31 U.S.T. at 5073-5074.

[92] Article 22.

[93] Ibid. at 64.

alternative measures to secure the return of a fugitive. And, as observed by Professor Bassiouni:

> *"Cooperation in all these cases was between law enforcement authorities who avoided and evaded judicial and legal processes. These cases may point to a trend in extradition practices where police work out their own arrangements to obtain rendition of individuals irrespective of what the legal system requires, and in avoidance of the judicial authorities altogether. This creates, of course, serious problems for the integrity of the legal process, even though it may be a manifestation of the frustration of law enforcement authorities with their inability to make the extradition system work with the speed and satisfaction they desire"*[94]

This was certainly the case with Machain, and later on, with Kansi, and arguably, Mohammed. It will not be a methodology easily ignored or abandoned by law enforcement, instead will remain an alternative tool toward the apprehension of fugitive terrorists, and one that is widely accepted, if not embraced within the law enforcement community.[95]

Acknowledged, of course, is the realization that often it is not the judiciary or the legal process which entertains the prospect of extradition, as not all states are open, or willing to cooperate if given the option, and that there are states which sponsor, and governments, which reinforce terrorist activity and behaviour, such as discussed in Chapter Six, and which reduce if not eliminate the potential for extradition or rendition. When the possibility for extradition or informal rendition is denied without other recourse, the resort to the alternatives also becomes more likely.

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[94] M. Cherif Bassiouni, International Extradition: United States Law and Practice 2nd Edition, (Dobbs Ferry: Oceana, 1987), at V.

[95] From a discussion with a U.S. Government Official who worked the Middle East desk during both the Achille Lauro and TWA 847. It has been requested that their comments remain unattributable, however, expressed passionately that the "grab and snatch" operations were the only way to go if you have a shot at it, and that it is far too frustrating to watch the 'bad guys' get away time after time, even though we know where they are. It's just as

7.5 Conclusions

In 1979, the United States was introduced to what their European counterparts had already dealt with for years, violence which would directly impact the safety of their citizens, test the boundaries of their legal reach, and question their ability to maintain their composure in the international community, all from an enemy that was largely unseen. While historically, this was not a new concept for the U.S., it was fast becoming a new priority for America both at home and abroad. The 1983 bombings of the U.S. Embassy (twice), and the U.S. Marine barracks in Beirut, forced the issue onto the agenda both domestically and abroad – but up to that point, the problem remained abroad.

The *Achille Lauro* incident brought new growing pains in terms of testing the limits our neighbours in the international community who were not willing to tolerate such bold steps to secure the custody of fugitive terrorists, the assumption that all U.S. interests necessarily align with the interest of our allies is not always the case, and that perhaps bully-politics and calling in the aircraft fighters was perhaps not the best way to try and solve the problem. Lesson learned: international cooperation is important for success.

Such lessons were taken into account during the apprehension of Hamadi two years later. Every legal loophole was threaded, 'i's were dotted and 't's were crossed. Still only a partial victory was savoured, and the battle never gained home field advantage due largely to the hostage dynamic imposed during the trial. Lesson

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easy to just get in there and get our guy, or pay someone to do it for us, as long as we get him, and that's the most important thing. Let the politicians work out the rest. *Source Unattributable*, Washington, D.C., August 1998.

learned: the process of extradition can and sometimes will open up alternative options available under treaty law, especially if it presents the more prudent political option, and this falls well within the boundaries of compliance and obligation imposed by international law. Only recently, the international community has witnessed a similar case to this, Lockerbie, in which Libya was denied U.S. and British custody of the two citizens indicted for the bombing and instead brought to a third party. While not the option of choice, the decision to hold the trial in a third country (the Netherlands), certainly fell neatly within the boundaries imposed by international obligation.

While alternatives such as the use of force, sanctions, deportation, have not been abandoned, they have not been a wholly convincing alternative. None of the major architects of terrorism have been successfully apprehended or brought to trial, and even with sanctions, states are largely dependent on the ability to rally other influential allies for broad based allied support. Lesson learned: there are times when the best the U.S. can do is to encourage other states to work together in dealing with the common threat of terrorism, especially with states who would otherwise choose to remain neutral.

There are difficulties incurred by formal cooperation, such as extradition, so it is not at all surprising that states have developed and often turned to methods of informal cooperation. The United States has developed more forms of police-to-police cooperation than perhaps any other country based on a system of transgovernmental values that transcends politics between governments.[96] The dramatic increase of FBI offices abroad, their ability to deal effectively with foreign

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[96] Ethan Nadelmann, Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement, (University Park: Pennsylvania State University Press, 1993), pp. 200-201

police agencies significantly increase the ability of law enforcement to deal with international crime.[97] This is not limited to the FBI, either; DEA and Immigration officials have increased their powers in the past decade, by contradicting the limitations of their original jurisdiction imposed by charter, and dramatically increasing their presence overseas with their own cache of police-to-police contacts and levels of cooperation and involvement not only with native police forces, but with other U.S. agencies at home and abroad. This type of cooperation was instrumental in tracking and apprehending Yousef for his role in the World Trade Center bombing.

It is to the terrorists' advantage to place themselves outside the parameter of U.S. jurisdiction, making it increasingly difficult to conduct investigations, collect intelligence, develop evidence, in order to create a case. The U.S. must increasingly rely on international cooperation from their foreign counterparts in order to compensate for this jurisdictional gap. The ability to create the legal groundwork long before the incident actually happens, will only benefit law enforcement when an incident arises, while at the same time allow our allies to protect their own interests, which may not always be consistent with the U.S. But this problem can be overcome by invoking discretionary loopholes, such as rendition, on occasion without abandoning extradition treaties or agreements for mutual assistance, but through diplomacy, foreign policy, and increased intelligence efforts which can substantially increase the ability to bring fugitives to justice.

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[97] Ibid.

Chapter Eight

Conclusion: The Politics of Extradition and the Future of Its Effectiveness Against Terrorism

> *History is not a cookbook of presented recipes. It teaches by analogy, not by maxims. It can illuminate the consequences of actions in comparable situations, yet each generation must discover for itself what situations are in fact comparable.*[98]

8.1 Introduction

It was intended that each chapter in the study would be presented as its own individual argument with its own conclusions, which draw upon the lessons regarding terrorist extradition implicit in each discussion. Therefore, a synopsis of the study on whole, rehashing those conclusions, would be repetitive. Prior discussion has already dealt with the major points; the importance of cooperation, the influence of politics, the alternatives to traditional bilateral interstate extradition, and the growing pains associated with these aspects. Instead, this final chapter intends to distil the various themes and issues raised throughout all of the previous discussions, and which highlight the fundamental issues, which surround U.S. extradition policy. It is an effort to bring out the 'sub-themes' which have not been overtly discussed, but which have been prevalent throughout the discussion. Specifically, it will discuss four main themes:

- What is the political relationship between extradition and terrorism?
- What are the key issues and problems surrounding the adoption and implementation of U.S. extradition treaties?

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[98] Henry Kissinger, The White House Years, (New York: Simon & Schuester, 1979).

- What are appropriate alternative responses to international terrorism, where extradition is not a possibility?

- How valuable is extradition as a tool in combating terrorism?

This survey does not introduce new questions surrounding extradition, rather it re-addresses the initial concepts introduced in the early chapters, and examined through empirical evidence. This last chapter is intended as a summation, or 'closing argument', not a recap.

8.2 The Politics of Extradition

It has been mentioned earlier, but it is necessary to reiterate, that this is not a study in the legal analyses of extradition. This is not a study meant to be classified under 'international law', but international relations. Granted, much time was spent in earlier chapters focusing on the amalgamation of these two disciplines for the purpose of the study, which encompasses aspects of both. This was unavoidable, and intended to provide a conceptual framework for thinking about the process of extradition. Extradition is not a purely legal concept. The methods by which it is invoked involve strong political influences, which are measured in terms of the level of compliance to treaty law, and international cooperation. Moreover, the context, or international environment, which surrounds the legal decision to extradite, is as much a part of the process as the law itself. Therefore, to understand the political relationship between extradition and terrorism is equally if not more important than understanding its legal underpinnings, which are preserved in American law, case by case.

8.2.1 Political Offence - Revisited

It is treaties, customary law, and the national laws of states, which provide the basis for international cooperation. Many international agreements are based on *aut dedere aut judicare*, the state's duty to extradite or prosecute the alleged offender. It imposes a duty on the state as a method to control violence, and failure to carry out this obligation, can only weaken the effectiveness of international cooperation. Therefore, the ability to adhere to this duty is a significant factor when assessing domestic and international deterrence toward any crime prevention, and in particular, toward terrorism. As discussed in earlier chapters, a significant impediment toward this is the political offence exception,[99] which is extremely pertinent toward terrorist extradition. Not all acts of terrorism are committed with the intent of achieving political recognition, or power, as an outcome. There are certain acts of terrorism, which are committed out of necessity, or out of self-defense, which is why political offence exists at all. However, political offence becomes especially problematic with cases involving terrorism, as the test of political offence occasionally, and imprecisely, is the applied standard by the court.[100] There is legal precedent surrounding such an issue, such as the cases involving the IRA and matters of extradition between the U.S. and the U.K., two democratic states with very strong relations and history of cooperation. These case precedents as well as the timeframe they appeared in, ultimately prompted a change in legislation and extradition treaties

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[99] See Chapter 3.3.3 for discussion of terrorism and political offence.

[100] For a discussion in greater depth of the legal proceedings, arguments, and court decisions surrounding cases involving political offence and the U.S. experience see: John Murphy, Punishing International Terrorists, The Legal Framework for Policy Initiatives, (Totowa, New Jersey: Rowman & Allanheld, 1986), under Extradition; The United States, pps. 61-72; and John Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, Columbia Journal of Transnational Law, 25:35, 1986, pps. 63-70.

within the U.S., even between the U.S. and its strongest allies. Bear in mind, this was an 'indoctrination' period for the U.S., when terrorism and terrorist attacks against its citizens was increasingly on the rise, as evidenced in the prior case study discussions in Chapters 4, 5, and 6. There was increasingly a call for the U.S. government to act. The four cases discussed below, are one example of how the U.S. extradition laws are reformed and policy changed due to the pressure of political influence.

The first case was initially discussed in Chapter 3: in the 1979 case of *In re McMullen*, where Peter McMullen the IRA terrorist accused of bombing British Army Barracks had fled to the United States,[101] and avoided extradition under the political offence clause. McMullen subsequently later turned against the IRA and became an informant, and the first to allege Gerry Adams was the chief of the IRA.

A similar case happened again, in 1981, in the case of *In re Mackin*. Desmond Mackin allegedly shot a British policeman in Northern Ireland, and fled to the U.S. where he avoided extradition under the political offence clause in the U.S.-U.K extradition treaty.[102] The U.S. government reaction to the court's decision in *Mackin* was an attempt to override the courts by arguing that political offence was ultimately a decision for executive discretion,[103] but their attempt failed. Mackin was never extradited, but was later found to be an illegal alien and deported to Dublin.[104]

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[101] Chapter 3.3.3 Terrorism and Political Offence

[102] United States magistrate for the Southern District of New York, Magistrate No. 80, Cr. Misc. 1, August 13, 1981.

[103] *Mackin v. Grant*, 668F. 2d 122, 2nd Circuit, 1981.

[104] Michael Farrell 'Senate Wobbles Over Law to Extradite Irish', *The New Statesman*, August 30, 1985.

A third case, *Quinn v. Robinson*[105] was a habeas corpus action in the Northern District Court of California, where the court ordered the release from jail of Liam Quinn, an IRA member accused of killing a London police officer in 1975, and conspiring to send mail bombs to Catholic bishops and British judges, and a news media executive. He allegedly placed bombs at railroad stations and two restaurants, which exploded causing numerous serious injuries. The Northern District Court ruled that these actions were carried out under the political offence clause.

The matter went before the Appellate Court, Ninth Circuit which reversed the decision.[106] The court contended that the question of political offence was reviewable because the larger issue was whether the extradition treaty covered the offence.[107] The court found that Quinn's acts did not constitute political offence, based on a) Quinn's acts took place outside of the territory of uprising, and therefore political offence was inapplicable[108]; b) political offence does not apply to the "indiscriminate bombing of civilian population"[109]; and c) Quinn was eligible to be extradited on a murder charge.[110]

A final example, *In re Doherty*[111], involved members of the IRA. Doherty was involved in an attack on a patrol of British soldiers in Northern Ireland. The attack

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[105] *Quinn v. Robinson*, No. C-82-6688 RPA (N.D. Cal. Oct. 3, 1983)

[106] 783 F. 2d 776, 9th Circuit, *cert. denied* 107 S. Ct. 271, 1986

[107] Ibid.

[108] Ibid at 807 (Judge Reinhardt).

[109] Ibid at 818 (Judge Duniway). Judge Duniway used the *Eain* test, where *Eain* killed two young Jewish males by placing an explosive in a trash bin. See discussion in Chapter 3.

[110] Ibid at 819 (Judge Fletcher).

[111] 599 F. Supp. 270 (S.D.N.Y. 1984), appeal dismissed sub nom. United States v. Doherty, 615 F. Supp. 755 (S.D.N.Y., 1985), 786 F. 2d 491 (2d Cir. 1986).

resulted in the death of one of the British soldiers. Doherty was arrested, charged, incarcerated in prison in Northern Ireland, and tried for this crime and several others. Following the trial, but before a decision could be handed down by the court; Doherty escaped from prison, and fled to New York. He was convicted in absentia, of murder, attempted murder, illegal possession of firearms and ammunition and of belonging to the IRA. Following his arrest in New York City, the British government filed a request for his extradition. Doherty claimed that his crimes had constituted political offences, to which the court agreed. In his dissenting opinion, District Judge Sprizzo, of the Southern District Court of New York wrote:

> *"the facts of this case present the assertion of the political offence exception in its most classic form. The death of Captain Westmacott, while a most tragic event, occurred in the context of an attempted ambush of a British army patrol. It was the British army's response to that action that gave rise to Captain Westmacott's death. Had this conduct occurred during the course of more traditional military hostilities, there could be little doubt that it would fall within the political offence exception.*[112]

Judge Sprizzo went on to contend that while it would not be beneficial to extend the benefit of political exception to all groups, or fanatical individuals with loosely defined political objectives, the IRA "has an organization, discipline, and command structure that distinguishes it from more amorphous groups."[113]

The U.S. government tried to intervene, by filing on behalf of the British Government, an action for a declaratory judgment that Doherty was extraditable. The Southern District court dismissed this action because it failed to "state a claim upon which relief could be granted".[114] The appellate court, which confirmed that the

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[112] Ibid. at 276

[113] Ibid.

[114] *U.S. v. Doherty*, 615 Supp. 755 (S.D.N.Y. 1985), 786 F. 2d 491 (2d Cir. 1986).

government is not in a position to bring declaratory judgment, upheld this and subsequent requests for extradition would have to be re-filed as a new case to an extradition magistrate.[115] The courts ruled in the end that the struggle ongoing in Northern Ireland was legitimate, subsequently, Doherty was never extradited.

This series of cases caused strong reaction on behalf of the U.S. government, who had failed to reverse the decision of political offence as a matter of executive decision. In all of these cases, it was the courts which had the final say, and the only say, in spite of government objection. These judgments were highly embarrassing to then U.S. President Ronald Regan and his administration. The U.S. Department of State feared that such rulings to deny extradition could damage relations with Great Britain, with the potential to extend to other countries with strong national policies against terrorism.[116] As a result, of *McMullen* and *Mackin*, the U.S. government concluded a new bilateral extradition treaty with specific provisions requiring the executive authority of the U.S. to have the power to determine whether an offence for which extradition is requested is applicable for the political offence exception.[117] This was in an effort to close this gap of political offence in terrorist cases, and remove this power from the courts. Legislation was introduced into the Senate, granting the government and the accused the right of appeal of a magistrate's decision regarding matters of extradition, and transferring the powers of decision making to the executive branch. However, Senate hearings concluded, that while the government and the

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[115] *U.S. v. Doherty*, 786 F. 2d 491 (2d Cir. 1986)

[116] Farrell, SENATE WOBBLES.

[117] The extradition treaty between the U.S. and Mexico, mentioned earlier in Chapter 7 in U.S. v. Machain, is one example, refer to U.S.-Mexico, article X, ¶ 1, 31 U.S.T. 5059, T.I.A.S. No. 9656, ratified January 25, 1980.

accused have the right of appeal, transferring the decision making authority from the courts to the Secretary of State would in effect undermine the very purpose of political offence to protect individuals from government oppression.[118] Extradition is a sensitive issue for Irish-Americans, America has given asylum to generations of Irish fugitives, and no one has ever been handed back to the British. Even the most moderate Irish- Americans see the extradition of fugitives as taking the British side. As evidenced by some of the commentary which took place in the debate from the Irish-American Senators, such as U.S. Senator John Kerry who commented "why is the Administration posing such a treaty with Britain and not Nicaragua?" In addition, to which U.S. Senator Pell supported by posing the IRA as "much less of a terrorist threat than the Contras in Nicaragua."[119]

There is also the sensitive issue of due legal process. Trial by jury is a fundamental principle to the U.S. legal system. The Diplock court system in Northern Ireland was another point of contention with the U.S. Senate. As noted by U.S. Senator Joseph Biden: "If we sign this treaty we will have to arrive at the conclusion ... that the present judicial system in Northern Ireland is, in fact one that is basically fair – a notion that I reject totally."[120]

The U.S. then turned to the existing treaty legislation, and began an initiative to eliminate the political offence exception entirely through concluding supplementary bilateral extradition treaties with friendly states. As a prototype, it used the

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[118] Extradition Act of 1981: Hearing on S. 1639 Before the Senate Committee on the Judiciary of the 97th Congress, 1st Session, 1981.

[119] Ibid.

[120] Ibid.

Supplementary Extradition Treaty with the United Kingdom, originally signed June 25, 1985, in an effort to close the loopholes of political offence. The UK Supplementary Treaty provides that "none of the following offences shall be regarded as an offence of a political character", listing the offences also identified in The Hague, Montreal, and Tokyo, and Protected Persons Conventions. The original draft treaty[121] continued to provide a list of additional offences, which would not classify under political character.[122] The U.S. Senate amended this draft due to serious concerns that such a draft would go too far in the other direction, denying the validity of political offence.[123] The test for amending the treaty was the determination that IRA members would in fact be able to receive a fair trail in Northern Ireland. And, as John Murphy points out:

> *"[I]t is highly debatable whether the judiciary should defer to the Executive Branch in cases involving claims of political persecution upon return. Without intending to impugn the integrity or good faith of officials in the Executive Branch, it is simply inconceivable that, as a political matter, the Department of State would decline to*

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[121] The treaty was amended following Senate Committee on Foreign Relations hearings, dropping the possession of firearms and conspiracy to commit any of the other offences, and a new article was added permitting judges to deny extradition if the accused can demonstrate "by a preponderance of evidence" that he would be denied a fair trial. See Senate amendments in 132 Congressional Record S9119-20, July 16, 1986.

[122] Subparagraphs (e)-(l) of the Supplementary Treaty found in *24 International Legal Materials 1104* add:
(e) murder;
manslaughter
maliciously wounding or inflicting grievous bodily harm;
kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage
the following offences relating to explosives:
the causing of an explosion likely to endanger life or cause serious damage to property;
conspiracy to cause such an explosion; or
the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;
the following offences relating to firearms or ammunition:
the possession of a firearm or ammunition by a person who intends either himself or trough another person to endanger life; or
the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;
an attempt to commit any of the foregoing offences.

[123] *Supra* at note 20

extradite a person to the United Kingdom on the ground that he was being sought for the purpose of persecution or that he could not get a fair trial."[124]

The point being that it is tricky business for the U.S. government to pass judgment on the legal systems of other countries, and especially ones with which they share good relations. The political implications alone of that would prove to be potentially damaging. There is also the expectation that the Executive branch would somehow be responsible for the underlying 'humanitarian' chord behind political offence, which is not something the executive branch is designed to adjudicate. It is the courts which have the final say, and one that the Executive branch is obliged to uphold. On June 17, 1986, The Supplemental Treaty on Extradition [revised] was passed by the Senate.[125]

8.2.2 The Role of the Executive in Matters of Extradition

With deference given to the above discussion, this short section is to briefly discuss exactly what the powers of the Executive are, in matters of extradition.

Under U.S. law, the federal government under the constitutional power of the United States exclusively controls matters of extradition, which allows it to engage in matters of foreign relations and to make treaties. In the absence of a treaty obligation, international law does not impose a duty to deliver a person who has sought haven within its boundaries.[126] Under the constitution of the U.S., the Fifth Amendment,

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[124] John Murphy, *The Future of Multilateralism And Efforts to Combat International Terrorism*, Columbia Journal of Transnational Law, 25:35, 1986, p. 76.

[125] 'Senate Signs Extradition Treaty', *International Herald Tribune*, July 18, 1986

[126] Lasa Oppenheim, International Law A Treatise, Third Edition, (NY: Longman Green & Co, 1920).

which is the guarantor of due process, and equal protection under the law, prohibits the surrender of such an individual to a requesting country except under the discretion of Congress. Furthermore, it is the Secretary of State, acting on behalf of the President, who is authorized to surrender a fugitive, but only in the presence of a treaty.[127] As noted in the above case example, the power of the Executive enjoys limited discretion over the courts; still, the Secretary of State may also refuse to extradite based on the determination that the treaty did not require extradition.[128]

There are other circumstances where the Executive can exercise discretion; such as in matters of double criminality,[129] where the fugitive's actions are criminal under the laws of both the requesting state, and the asylum state. Matters of insufficient evidence, or the requested extradition of nationals, are also matters of executive discretion. Political Offence, as discussed in greater length above, is the one area where the hands of the executive are tied, if the crime committed is part of, and in furtherance to, a political uprising. Even if the act is not directly connected with political activity, it is the issue of motivation that is brought forward for review. Constitutionally, where the political offence defense is proven the Executive would be without the power to surrender the fugitive.

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[127] *NOTE: Executive Discretion in Extradition*, Columbia Law Review, vol. 62: 1313, 1962, p. 1314.

[128] Ibid, p.1316

[129] For greater discussion on these principles see: M.N. Shaw, International Law, (Cambridge: Cambridge University Press, 1994); Cherief M. Bassiouni and Edward Wise, Aut Dedere Aut Judicare, (Dordrecht: Martinus Nijhoff, 1996); Michael Akehurst, Modern Introduction to International Law Seventh Revised Edition, (London: Routledge Press, 1997)

8.3 A Matter of Reciprocity

It is a fundamental understanding not to be overlooked is that extradition is a matter of reciprocity, a 'two way street' in terms of cooperation. While this may be readily apparent for the U.S. when dealing with close allies, with deep historical ties, and a pattern of cooperation, this is not usually where the problem becomes an issue. Recall the case of *Achille Lauro* in Chapter 4, where Abu Abbas fled from Italy to Yugoslavia, and eventually to freedom. Yugoslavia refused extradition largely on the grounds of the U.S. failure to extradite Aurotvik, wanted for genocide and war crimes in Yugoslavia, and enjoying political immunity in the United States.[130] The U.S. and Yugoslavia had a valid extradition treaty, and Abbas could and should have been surrendered, despite the fact that Yugoslavia felt ignored by the U.S. on a matter of importance to them. It is very much a reciprocation effort, which is why the U.S. immediately arranged for the extradition of Aurotvik following the Abbas incident, but it was an afterthought, and Yugoslavia responded in kind by letting Abbas escape.

For the most part, the U.S. does not have the worst record on extradition; it does not have the best one either. Now, there is no real way of qualifying this because there currently is not a system in place to *monitor* extradition. There currently are no statistics on the total number of extradition cases brought before magistrate's in the U.S., and there is no way of tracking the total number of extradition requests still pending or ones that have been fulfilled.[131] Many of the NGO's which are issue-

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[130] Chapter 4.4.1.

[131] There does not appear to be any 'global' report on extradition, unlike other issues such as the 'UN Global Report on Trafficking' or Human Rights reports. Some individual countries do, however, report on extradition reform. Canada, for example, tracks legislation on extradition reform, proposed legislation on extradition, and its impact. To view this table, compiled by the Canadian Department of Justice, see: http://canada.justice.gc.ca/en/news/nr/1998/extrt.html.

specific, such as human rights organizations, have their own tracking statistics, but they are, again, issue specific, and *do not reflect the big picture of the record of extradition in the U.S.* This has brought calls for reform on extradition by members of Congress. H.R. 3212, for example, supported by Congressman Dan Miller, which would call for the U.S. Department of State to monitor extradition, track the amount of requests, and no later than January 1 each year, submit an annual report on extradition to Congress.[132] As of now, there is now such system in place.

It is feasible to say, however, without the need for too much evidence, that the U.S. does have a *selective* record on extradition. Like any country with a large agenda, the U.S. tends to focus on those matters, which are significant and have impact on their political agenda, and this is especially true in matters of national security. An excellent example of this is the U.S. "war on drugs".

Drug trafficking is a business that necessitates a high degree of international movement of commodities, money, and personnel. This has spearheaded an increasing number of bilateral extradition treaties, either newly created, or radically reformed, in Central American and Caribbean countries regarded by the Drug Enforcement Agency (DEA) as either drug producing or drug transiting. This effort is mainly an attempt to remove some of the wiggle room for previously imposed limitations by explicitly stating that all drug offences are extraditable. However, the problem is not with the bi-lateral arrangements, but with the individual governments themselves.

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[132] For a complete understanding of what this bill does, as well as highlights and excerpts of H.R. 3212, see Congressman Dan Miller's Extradition Reform Web Site at: http://www.house.gov/danmiller/ieea.html.

Take for example the case of Colombia. Colombia and the U.S. had close to a 10-year gap in extradition, especially in cases involving drug-related offences. One reason for this, ostensibly, is fear on behalf of the drug lords of the stiff penalties imposed on them in the U.S. That 'fear' fuelled a wave of bombings and assassinations that were blamed on the drug lords, resulting in a national ban on extradition in 1991.[133]

In 1997, under pressure from the U.S., Colombia reinstated extradition. One reason for this was money. The carrot, was millions of U.S. dollars which would be poured into Colombia for assistance in the drug war.[134] Colombia's Chamber of Representatives passed a 'watered-down' extradition bill, reducing the chances that powerful Colombian drug traffickers will be extradited to the U.S. for trial.[135] The bill, which passed 119-38, mandates that no Colombian may be extradited for crimes committed before the new law was passed. This means, that the heads of the Cali drug cartel will serve less than 15 years in Colombian prisons, as opposed to a life sentence if extradited to the United States. Amidst speculation, was the fact that cartel leaders allegedly contributed heavily to President Ernesto Samper's 1994 election campaign.[136] The weak bill, an attempt to pacify both the U.S. and the drug traffickers, instead strained relations between the two countries.

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[133] 'Drug Lords Feared Tough Sentences', November 25, 1999, http://www.cnn.com/WORLD/americas/9911/25/drugs.colombia.02/.

[134] 100 million dollars in U.S. assistance was provided to Colombia in 1998. See: Background Notes, U.S. Department of State, January 1999, www.state.gov/www/background_notes/colombia_0199_bgn.html.

[135] Steven Ambrus, 'Colombia gives final ok to weak extradition law', *Los Angeles Times (Washington Edition)*, November 26, 1997, p. A2, Reuters Press, 'Colombia to extradite for future Crimes', *Washington Times*, November 26, 1997, p. A16.

[136] 'Colombian House Absolves President Ernesto Samper, U.S. Revokes His Visa', *Newsbriefs*, Summer, 1996.

In 1999, however, in spite of two bombings that occurred in Bogotá, Colombia, Colombian President Andres Pastrana signed the extradition order for two major members of the Cali drug cartel who were extradited to the U.S. Jamie Orlando Lara, extradited in November 1999, was the first Colombian extradited to the U.S. since 1990; and Fernando Jose Flores, extradited less than a week later, also in November 1999.[137] As a result, President Clinton praised Pastrana's courage and pledged to work with Congress on a major aid package to Colombia the following year.[138]

Drug war extradition cases provide an interesting example of how the U.S. is able to use extradition, and its political influence to encourage extradition, with its south of the border neighbours which pose a real threat to border security of the U.S. It is a good example of political influence and the relationship between politics and extradition. Still, this is a thesis about extradition and terrorism, and the latter is a threat to U.S. national security, and a high priority on the U.S. agenda, which as evidenced throughout the previous case studies in this work. Terrorism cases provide their own unique challenges to extradition.

It is necessary to address that not all difficulties with extradition are U.S.-centric requests for extradition, and that difficulties arise when the U.S. is a requested state as well. Even countries with whom the U.S. has good relations, there remain significant challenges. Take for example the case of Israel, and the extradition of leading Hamas figure Mousa Abu Marzook.

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[137] Colombia extradites another alleged drug lord to U.S., http://www.cnn.com/WORLD/americas/9911/25/drugs.colombia.02/

[138] Ibid.

U.S. immigration apprehended Marzook as he arrived in Kennedy Airport, New York from the United Arab Emirates. His name appeared on a terrorist watch list as he proceeded through customs, and he was detained under a law banning people with known or suspected ties to terrorist activities.[139] Described by U.S. authorities as the head of the political bureau of Hamas, which opposes the peace process between the PLO and Israel, and is responsible for orchestrating terrorist attacks against Israeli citizens. Marzook, maintained that he was a businessman only, and the extent of his activities were to raise money in the U.S. that he transferred to the Middle East and received money from abroad which was invested in overseas clients. He did not deny his involvement in the social service activities of Hamas, or groups like Hamas, but denied all involvement in terrorism.

There was a general inquiry as to how Marzook actually entered the country, and whether or not he was truthful about his involvement with terrorist organizations.[140] Providing false information to immigration authorities is not a federal offence, but it is a deportable one. As a holding technique, the U.S. began exclusion proceedings against Marzook, but Marzook was a permanent resident alien, and exclusion is technically not applicable to green card holders. Also, under U.S. law, it is not illegal to raise funds in the United States for social services groups abroad, but it is against Federal terrorism statutes to support activities of international terrorism. These lines can be blurry, especially for a group like Hamas, which claims responsibility for

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[139] Ian Brodie, 'Hamas suspect held in US', *The New York Times*, July 29, 1995

[140] David Johnston, 'U.S. Opens Broad Investigation of Hamas Political Leader Being Detained in New York', *The New York Times*, August 4, 1995.

numerous terrorist activities throughout Israel, but also finances and operates social service programs in Palestinian areas such as Gaza and the West Bank.

Israel, upon learning of Marzook's detention in the U.S., began the proceedings for extradition on July 31, 1995. Israel claimed that Marzook helped to found Hamas in 1989, that he had committed vicariously 10 acts of violence under a conspiracy theory between 1990 and 1994.[141]

On August 7, 1995, Israel filed a provisional complaint for extradition charging that as one of the group's senior leaders, Marzook led the political arm responsible for terrorist attacks against Israeli citizens.[142] Under the U.S.-Israeli extradition treaty, Israel has 60 days to request extradition of a fugitive, but must present detailed evidence to sustain the charges.[143] Realizing that 'conspiracy' is not an extraditable offence under the U.S.-Israeli extradition treaty, simply because 'conspiracy' lacks actual criminality, the Israeli government ultimately filed a new complaint which was titled the "Request for Extradition", on September 28, 1995. However, nothing happened on either side, and Marzook sat for 20 months incarcerated without ever being charged.

At the opening of Marzook's extradition hearing in New York, U.S., Federal Prosecutors asserted that Marzook had raised hundreds of thousands of dollars for Hamas, and authorized much of that money to spend on weapons.[144] The complaint

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[141] Richard Curtiss, 'An American Dreyfus Affair: The Case of Mousa Abu Marzook', *Washington Report on Middle East Affairs*, April/May 1997.

[142] Joel Greenberg, 'Israel to Seek Extradition of Reputed Islamic Militant Leader', *The New York Times*, July 31, 1995.

[143] U.S.-Israel Treaty of Extradition, see: http://www.state.gov/ww/global/legal_affairs/tifindex.html.

[144] James C. McKinley Jr., 'U.S. Charges A Palestinian In Terror Case, Detained Leader Tied to Hamas Fund', *The New York Times*, August 9, 1995.

charged further, that Marzook had 'overseen the recruitment and training of terrorists who were planning to travel to Israel to fight in the holy war',[145] and was linked to some 13 different terrorist attacks. On August 7, 1995, the same day Israel filed its provisional complaint, the U.S. issued its own first warrant for his arrest, but made no allegations that Marzook had committed individual offences.[146]

The decision to seek an arrest warrant for Marzook was not a product of the Israeli Criminal Justice system, but was decided in the cabinet of then-Prime Minister Yitzhak Rabin. Rabin, who was under intense pressure from his own party, of being unable to cope with the terrorist threat, and providing adequate safety for his people.[147] This was not a legal decision, but a political one. In fact, the legal authorities in Israel discounted the possibility of extradition as they could not produce evidence actually linking Marzook to these terrorist attacks, nor could they effectively establish charges to the contrary.[148]

By May 1996, New York Federal Judge Kevin Duffy ruled that Marzook could legally be extradited to Israel, under charges for murder and terrorism, but that he would be held in detention until a final determination could be made about turning him over to Israeli authorities.[149] Under U.S. law, the case would now go to the

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[145] Ibid.

[146] *Ibid* at note 40

[147] Ibid.

[148] Barton Gellman, 'Israel Drops Its Request to U.S. for Extradition of Leading Hamas Figure', *International Herald Tribune*, April 4, 1996.

[149] John M. Goshko, 'Judge Says Detained Hammas Politician Can Be Extradited', *The Washington Post*, May 10, 1996, p. 3

Secretary of State who would then sign the extradition order to send Marzook back to Israel.

Israel, now feared intense reprisals and that trying Marzook would provoke new waves of retributive violence, decided ultimately that they really did not want him at all.[150] This now left both the Clinton administration and the new Netanyahu administration to find a face-saving retreat. The problem was solved when King Hussein of Jordan, 'invited' Marzook back to Amman, where the U.S. deported him to Jordan under the Immigration and Nationality Act, U.S.C. §§ 1182 on May 5, 1997.[151]

It's fitting to note, that two years later, in 1999 during King Abdullah of Jordan's new policy of cracking down on Hamas operations in Jordan, 22 high ranking members of Hamas operating out of offices Amman were arrested; one of detainee's was Abu Marzook. All of the members arrested carrying Jordanian passports were jailed and charged with membership to an illegal organization, except Marzook who, travelling on a Yemeni passport, was deported to Dubai, and flew on to Damascus where he remains today.[152]

Evidence of political influence on extradition is apparent not only in countries with which we have good, or amicable relations, but in countries where no relationship exits at all. Ostensibly, these are not only the most challenging forms of attempted extradition, but the most exigent forms of diplomacy, and they often fail.

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[150] McKinley, U.S. CHARGES

[151] Terrorism in the United States 1997, *FBI Report*, p. 6

[152] Lisa Beyer, 'Nowhere to run', *Time*, October 11, 1999

Take the case for example, of the hijacking of Kuwaiti Flight 221 to Tehran and the attempted U.S. extradition of the hijackers from Iran.

On December 4, 1984, four Hezbollah gunmen[153] hijacked a Kuwaiti jetliner with 155 people on board and forced the plane, shortly after take-off from the United Arab Emirates, to fly to Tehran.[154] Tehran, not eager to accept the plane, denied permission to land, but reversed its decision after the pilot claimed a fuel emergency.[155] The hijackers killed one passenger upon landing, and threw his body on the tarmac in Tehran, but later in the day released 44 passengers, mostly women and children.[156]

The hijacking of the Kuwaiti target was in response to the recent tough stance of punishing terrorists who hit American targets, in Kuwait. Earlier that year, Kuwaiti officials brought to trial 17 terrorists, who were sentenced to death or long prison terms. The hijacking was in the hope of forcing Kuwait to release the imprisoned terrorists.[157]

For six days, the jetliner stood on the tarmac in Tehran. Its passengers were beaten, tortured, and tied to their seats.[158] A second victim, a U.S. AID worker, was shot six times in front of Iranian television cameras, his body thrown to the tarmac by

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[153] Claude van England, 'Who are the terrorists behind planning, execution of Kuwaiti airliner hijacking?', *Christian Science Monitor*, December 10, 1984; 'Behind the Teheran hijack', *Foreign Report*, December 13, 1984

[154] '155 On a Jetliner Hijacked To Iran', *The New York Times*, December 5, 1984.

[155] John Kohan, 'Horror Aboard Flight 221', *Time*, December 17, 1984

[156] *Los Angeles Times*, December 5, 1984

[157] David Ottaway, 'Hijack Called Part of Plot to End Support for Iraq', *Washington Post*, December 15, 1984.

[158] John Kifner, 'Ex-Hostages on Airliner Tell of Six Days of Hell', *New York Times*, December 11, 1984; Charles P. Wallace, 'Hostages Describe 6 Days of Torture', *Los Angeles Times*, December 11, 1984; United Press International, 'Hostages Accuse Jet's Hijackers of Using Torture', *International Herald Tribune*, December 11, 1984.

one of the gunmen.[159] Before the hijackers could detonate the explosive-rigged plane, Iranian guards stormed the plane and ended the hijacking.[160] By the time the ordeal was over, there would be four victims, two of them Americans.[161]

Throughout the ordeal, there had been U.S. accusations of Iranian complicity[162] toward the hijacking, criticism of Iran's handling of the crisis[163], even allegations of encouragement and assistance to the hijackers.[164] Now that the incident was over, the rhetoric quieted down to U.S. 'patience' with Iran for one very important reason. Iran had custody of the hijackers.[165]

Since the hostage crisis in 1979, the U.S. has severed all diplomatic relations with Iran, and to charge the atmosphere a little more, in 1984, for the first time since 1967, the U.S. had established formal diplomatic relations with Iraq. This is rather poignant due to the context, remember, which was in the middle of the Iran-Iraq war.[166] The U.S. was now looking to extradite four members of the Hezbollah from Iran, a country known for their state support of terrorism, to the U.S. for trial. There was no treaty. There were no diplomatic relations. There was not a very good chance for

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[159] The Associated Press, 'Hijackers Threaten More Killings After 4 Are Slain at Iran Airport', *The New York Times*, December 8, 1984.

[160] John Kifner, 'Plane Is Reported Stormed In Iran; 9 Hostages Freed', *The New York Times*, December 10, 1984; Charles P. Wallace, 'Iranians Rush Jet, Free Last Captives', *Los Angeles Times*, December 10, 1984.

[161] The Associated Press, 'Hijackers In Iran Reported To Kill Two More on Jet', *New York Times, December* 7, 1984.

[162] David Ottaway 'Americans Saw No Iranian Complicity', *Washington Post*, December 12, 1984.

[163] Terence Smith, 'Reagan Criticizes Iran on Hijacking', The New York Times, December 8, 1984.

[164] Terence Smith, 'U.S. Charges Iran With Encouraging Hijackers of Jet', December 12, 1984.

[165] Doyle McManus, 'U.S. Being Patient – So Far – on Iran's Moves on Hijackers', *Los Angeles Times*, December 14, 1984.

[166] For discussion and general, basic, information on the Iran-Iraq War 1980-1988, see: The Columbia Encyclopedia, 6th Edition, (New York: Columbia University Press, 2001).

success, and success never happened. Iran adamantly refused to extradite the hijackers, and the Iranian Press quoted the Prime Minister saying, "If handing over the hijackers was lawful, they should hand over the terrorists who have martyred hundreds inside Iran and who are now continuing their activities with support of the Americans and the French."[167] This was a direct reference to several Iranian dissidents whose leaders live in France, who were charged by Iran of having instigated a series of hijackings against Iranian airliners, and who were never extradited. In fact, Iran was quick to point out that "no country has so far extradited to Iran hijackers of Iranian airliners".[168] Kuwait, which had also requested the hijacker's extradition, to which the Iranian public prosecutor Hojatolislam Emadi replied to an Iranian news agency "such irrational requests will not be accepted."[169]

Iran instead, claimed they would try the hijackers themselves, in accordance with Islamic law, which technically they are entitled to do. There was widespread speculation, however, that the *offer* to try the hijackers was largely a ruse to counter criticism that Iranian authorities may have been in collusion with the hijackers. The U.S. Department of State, soon after this announcement verbalized hopes for an 'open trial', spokesman Alan Romberg noting that "An open trial obviously is the greatest assurance that the world community will have that Iran is dealing seriously with these murderers."[170]

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[167] The Associated Press, 'Iran Is Adamant On The Hijackers, Premier Quoted as Indicating They Won't Be Extradited', *The New York Times*, December 13, 1984.

[168] 'Iranians Say Four Hijackers Will Be Tried', *The New York Times*, December 23, 1984.

[169] Times Wire Service, 'Trial Planned for Captured Hijackers, Iran Says', *Los Angeles Times*, December 19, 1984.

[170] Smith, REGAN CRITICIZES.

The point of all this is that extradition cannot be a one-sided affair, and there are issues that influence the success of extradition regardless of whether or not the legal basis exists. What this discussion illuminates, is that largely, there is evidence of political influence, intervention, or interference, in various stages of implementation of the extradition process. This is apparent from the treaty implementation phase, through the request phase, and even in cases where no relationship exists at all. As evidenced in previous case studies in the preceding chapters, irrespective of the legal obligation of extradition that is often pre-existing, there are several challenges that can undermine its compliance. However, like the example of Abu Abbas in the *Achille Lauro* incident, where surely international cooperation was the important lesson learned, the failure of that incident rested more on the political inability to advance a relationship of extradition with Yugoslavia, than it did on Italian compliance.

In the case of the TWA 847 and the trial of Mohammed Ali Hamadei, there were strong political overtones, even where an existing treaty had influence, and although his extradition never transpired, Hamadei was still tried, and convicted. This is far from justice never being served at all, but the extent of his punishment was driven by political fear, which is not much different that the Colombian drug lord examples of political interference. The point being, however, that in order for the U.S. to expect legal compliance to extradition laws, there are and will be instances where the ability to achieve this will depend directly on the amount of political 'give'. This, in a democratic society, where democratic values largely are implicit in the constitution and in the courts, can prove tricky especially in cases where there is a distinct gap in political values. However, as previous discussion has also demonstrated, there still remain alternatives even beyond the politically influenced boundaries of extradition.

8.4 The Viable Alternatives

In maintaining the original objectives of this Chapter, which are 'summation' not 'synopsis', this section will briefly consider some of the themes of alternative response as they relate to the overall discussion involving the value of extradition as means against terrorism.

8.4.1 Strengthening Intelligence-Law Enforcement Cooperation

There is a general belief around the law enforcement community that for every trial and prosecution of a terrorist, there represents a failure of intelligence to stop the act from happening in the first place. This thinking is not without some merit, although indicative of the larger 'blame game' obvious throughout U.S. government agencies. In 1999, Congress established The National Commission on Terrorism to evaluate the laws, policies, and practices for preventing and punishing terrorism directed at American citizens.[171] The Commission concluded that while they believed that U.S. policy was generally on the right track, one of the first recommendations was to use the full scope of U.S. intelligence and law enforcement communities intelligence collection methods regarding terrorist plans and operations.[172] This is easier said than done: it requires sharing, something that U.S. government agencies no matter how much they *say* they want to cooperate do not really wish to do. As discussed in Chapter 7, some lines of power have been redrawn: the FBI for example, which now enjoys a recent extension of jurisdictional powers, allowing them the

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[171] The National Committee on Terrorism Report, *Countering the Changing Threat of International Terrorism*, is available at: http://www.fas.org/irp/threat/commission.html

[172] Ibid. p.3

ability to perform investigations overseas.[173] This causes some overlap in investigations and information with other agencies with similar jurisdiction, such as the CIA or Diplomatic Security, but the important thing to remember is that the mission of law enforcement is very different from that of an intelligence analyst. Analysts concern themselves with trends, tactics, and, obviously, analysis. Law enforcement's mission is to 'identify, deter, and disrupt'; their very mission is that of a trained criminal investigator, which is why the investigative expertise of an agency such as the FBI is so genuinely indispensable.[174]

There is no reason to be fatalistic about this; interagency cooperation happens all the time, everyday in the government, as evidenced in the Kansi case discussion in Chapter 7.[175] This is not a foreign concept. However, continued, greater cooperation, like that discussed in the Kansi case, is invaluable for prevention, investigation, or as a supplier of evidence in a potential extradition hearing or request. While this may not entirely qualify as an alternative to extradition, it certainly provides it a good first line of defense.[176]

8.4.2 Sanctions

Another recommendation by the Commission's report was that of continued support of the use of sanctions, not only toward countries that support terrorism, but

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[173] See: Chapter 7. 2 The Changing Nature of Terrorism and Its Impact on Law Enforcement

[174] Interview with Robert Jenkins, Senior Policy Advisor, U.S. Department of State, June 13, 2001.

[175] Kansi case study Chapter 7.3.3

[176] See Chapter 7.3.1 for World Trade Center bombing case and rendition of Ramzi Yousef.

also toward those that do not do enough to prevent terrorism.[177] Interestingly enough, Pakistan was one of the suggested candidates for this type of 'Not Cooperating Fully' responses. Pakistan is actually an interesting case, notwithstanding the role of Pakistan in the apprehension of Ramzi Yousef, or Amir Kansi[178], which was an effort on behalf of Pakistan to stay off such a list. But take for example, the role of Pakistan as a supporter of terrorism and in particular, its relationship with the Taliban in Afghanistan over the protection of Osama bin Laden.

Pakistan is generally inconsistent in its record of cooperation in matters of counter terrorism. They provide a safe haven, transit points, moral, political, and even diplomatic sympathy to several groups that engage in terrorist activity.[179] In the case of bin Laden, he is in some regions of Pakistan, a hero. In Pakistan's oldest and largest religious school, near the Afghanistan border, there is a poster of Bin Laden calling him a holy warrior. The school, every year sends hundreds of its graduates to support Bin Laden's allies in Afghanistan.[180] There has even been evidence of collusion between bin Laden and members of Pakistani leadership against India.[181]

Pakistan and the Taliban, however, remain potentially the only possibility for bin Laden's extradition. Afghanistan's Taliban government has stated repeatedly that it intends to cooperate with the international community to combat terrorism in the

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[177] "The President should impose sanctions on countries that, while not director sponsors of terrorism, are nevertheless not cooperating fully on counter terrorism." COMMITTEE ON TERRORISM REPORT, p. 2

[178] Ibid.

[179] COMMITTEE ON TERRORISM REPORT, p. 15

[180] Tim Weiner, 'In Islamic World, Osama bin Laden's Esteem Rises', *Health and Energy*, February 8, 1999.

[181] Raja Asghar, 'Bin Laden sparks Pakistan duel', *Middle East Times*, issue 98-36

'vested interests in the name of Islam',[182] yet they have not attempted to curb bin Laden's activities, and have repeatedly refused requests for his extradition. Pakistan remains the vital regional player, for both the U.S. and for Afghanistan. Pressure in the form of sanctions on Pakistan could potentially have a spillover effect in the region, pushing Afghanistan to squeeze Bin Laden out of his sanctuary.

As an overall method of deterrence, however, and as discussed in greater length in Chapter 6[183], sanctions cannot be a unilateral force, or they are useless. As a matter of policy, they should be applied cautiously with specific goals in mind, and not just as an arbitrary, alternative response.

8.4.3 The International Criminal Court

The recent extradition of Slobodan Milosevic to the U.N. war crimes tribunal in June 2001 was a historical first. Never before has a former head of state faced the court for crimes against humanity.[184] The popularity of the idea of a central court or International Criminal Court (ICC) that tries war crimes, crimes against humanity and genocide, has increased substantially in recent years,[185] and is coming ever closer to becoming a reality.[186] Although there has not been a consensus toward the idea, there

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[182] 'Osama bin Laden Hunt Intensifies' ,*Stratfor Global Intelligence Update*, October 12, 1999, http://www.stratfor.com/SERVICES/GIU/101299ASP

[183] See discussion, Chapter 6.4

[184] Anthony Deutsche, 'Milosevic in Hague to Face Tribunal', *Associated Press*, June 28, 2001.

[185] 'Toward an Effective International Criminal Court, Meeting the Challenge', International Centre for Human Rights and Democratic Development, Paper, September 1, 1998.

[186] See discussion Chapter 6.4.2.

exists the possibility that serious crimes of international terrorism could become included as part of the overall remit of the ICC.

As an alternative to interstate extradition, the idea of an international court is not beyond the realm of possibility. It involves the process of extradition to the court, but this may not be more difficult in typical cases than the task of traditional bilateral interstate extradition. By redrawing the jurisdictional lines, it has the potential to address issues such as state sponsorship and harbouring of terrorists. Take for example the case of Lockerbie, which appeared for years as a hopeless case, until the extradition of the two men Abdel Basel Ali Mohamed al Megrahi, and Lamen Khalifa Fhimah, who were extradited to Scottish jurisdiction in the Netherlands. Obviously, this was not the first choice of solutions for either the U.S. or the U.K., but given the options between that or nothing; something is and always will be better than nothing.

8.5 The Answer Is ...

With respect to the four main themes of the work which were presented in Chapter 1, and readdressed at the beginning of this Chapter, the following conclusion can be drawn:

- *What is the political relationship between extradition and terrorism?*

  The political relationship between extradition and terrorism rests not only in the obligation set forth in treaty law, but in the execution of the treaty, the prosecution of the case, and the compliance to international law. As it has been demonstrated repeatedly throughout the case studies and discussions in this study, extradition is not about the law alone, but the political influences, which accompany the decision to invoke the law, and the two are inextricably linked.

- *What are the key issues and problems surrounding the adoption and implementation of U.S. extradition treaties?*

As the work has demonstrated, there are many levels to this aspect of extradition. They stem from the obvious legal, constitutional, and value-based political issues, to the more obscure 'tit-for-tat' issues of reciprocity, and the deeper issues of international cooperation. Extradition is a matter of process, decided upon by the U.S. courts, and executed through the Executive, but in democracies it is often the courts that will have the final say. Matters such as political offence, will always be an issue, as long as there continue to be liberal democracies that value the benefit of this exception.

- *What are appropriate alternative responses to international terrorism, where extradition is not a possibility?*

The successful use of rendition as an alternative to extradition has meaningful possibilities. Nine out of thirteen high profile U.S. trials of foreign terrorists between the years of 1993 and 1999[187] have been through methods of rendition. As demonstrated, exclusion and deportation are also potential means for removing terrorists from their safe havens. These methods may prove to be meaningful in many future cases involving fugitive terrorists, as bonds of international cooperation are become stronger against international crime, and the use of lower level, inter-agency cooperation on law enforcement levels is becoming the preferred method of choice. A recent example of this is the indictment of the 13 Saudis and one Lebanese national on 46 counts including conspiracy to commit murder and conspiracy to use a weapon of mass destruction

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[187] Refer to Appendix A for chart.

in the Khobar Towers bombing incident.[188] The basis of success was not the 'unwavering pursuit of the investigation', but the ability for the U.S. and the Saudi government to cooperate on the criminal matter of terrorism.

As discussed, smartly applied sanctions with direction and purpose have a distinct appeal; and the possibilities of extradition to an International Criminal Court may have the potential to reach those cases that at present still manage to slip through the net. Reason being is that more countries are likely to see the ICC as a legitimate mechanism, which could develop special expertise in this type of crime, similar to their handling of war crimes. The use of an ICC could potentially mean extradition to an international body, in lieu of tradition bilateral interstate extradition. There are advantages to this: it would be seen as a legitimate authority, backed by the UN, which could make it more acceptable as an alternative than extradition to a superpower like the U.S. Courts of a smaller country would be more likely to proceed with a trial of a sensitive case, such as in the Hamadei example, since there would be a considerably less likelihood of states threatened by reprisals from terrorists. Of greater significance, however, would be the universal message that there is no hiding place under this new sense of universal jurisdiction. However, in order for this to actually take place, the ICC's remit would require widening its scope in order to include terrorism, which presently it does not.

In addition, there remains the final possibility of convergence of laws. This would essentially provide the final prong as part of a 'law – international measures

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[188] 'Indictments in Khobar Towers Bombing', http://www.ABCNEWS.com June 22, 2001.

– convergence' multi-tiered legal approach toward punishing terrorists. However, this final point is crucial if terrorists are truly to be without a place to hide.

- *How valuable is extradition as a tool in combating terrorism?*

Extradition alone cannot win the war on terrorism. However, extradition acting in concert with other alternatives cannot be discounted as a powerful option. It is not just extradition that is being argued for here, but the rule of law, and compliance to the rule of law. Granted this may not always be a part of the first line of defense in the war against terrorism, but it can not, and should not, be discounted as a fair and effective method for bringing terrorists to justice; nor should it be sidelined as being of secondary importance. The rule of law is the one thing that binds our well-ordered society together; it is the last word on issues of fairness, and the first response when seeking justice. There are no issues of policy, security, or defense that escape the rule of law. It is an integral part of our society, our system of values, and the international community as a whole. In matters of terrorism, it deserves its place as a deterrent not just in cases of extradition, but also as having the potential to accomplish more than the mere documentation of international cooperation.

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Appendix

Extraditions and Renditions of Terrorists to the United States, 1993-1999
Patterns of Global Terrorism -2000
Released by the Office of the Coordinator for Counterterrorism
April 2001

Date	Name	Extradition or Rendition	From
March 1993	Mahmoud Abu Halima (February 1993 World Trade Center bombing)	Extradition	*
July 1993	Mohammed Ali Rezaq (November 1985 hijacking of Egyptair 648)	Rendition	Nigeria
February 1995	Ramzi Ahmed Yousef (January 1995 Far East bomb plot, February 1993 World Trade Center bombing)	Extradition	Pakistan
April 1995	Abdul Hakim Murad (January 1995 Far East bomb plot)	Rendition	Philippines
August 1995	Eyad Mahmoud Ismail Najim (February 1993 World Trade Center bombing)	Extradition	Jordan
December 1995	Wali Khan Amin Shah (January 1995 Far East bomb plot)	Rendition	*
September 1996	Tsutomu Shirosaki (May 1986 attack on US Embassy, Jakarta)	Rendition	*
June 1997	Mir Aimal Kansi (January 1993 shooting outside CIA headquarters)	Rendition	*
June 1998	Mohammed Rashid (August 1982 Pan Am bombing)	Rendition	*
August 1998	Mohamed Rashed Daoud Al-Owhali (August 1998 US Embassy bombing in Kenya)	Rendition	Kenya
August 1998	Mohamed Sadeek Odeh (August 1998 US Embassy bombing in Kenya)	Rendition	Kenya
December 1998	Mamdouh Mahmud Salim (August 1998 East Africa bombings)	Extradition	Germany
October 1999	Khalfan Khamis Mohamed (August 1998 US Embassy bombing in Tanzania)	Rendition	South Africa
* Country not disclosed			